1973

Brian Humphries v. Remco, Inc., A Utah Corporation : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

BRIAN HUMPHRIES,

Plaintiff-Respondent,

vs.

REMCO, INC., A UTAH CORPORATION,

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT FOR WASHINGTON COUNTY,
STATE OF UTAH,
HONORABLE J. HARLAN BURNS

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BRIAN HUMPHRIES,
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vs.
REMCO, INC., A UTAH CORPORATION,
Defendant-Appellant.

Case No. 13345

BRIEF OF RESPONDENT

STATEMENT AND NATURE OF CASE

This is an action filed in the Fifth Judicial District Court, Washington County, State of Utah brought by the Plaintiff based on a certain notice of lien Plaintiff caused to be recorded in the Iron County Recorder's Office, in Book 176 at pages 428-429 against the real property of Defendant located in Iron County, Utah to collect the balance due on a Brick-laying Contract together with interest, costs and attorney's fees.

DISPOSITION IN LOWER COURT

The case was heard by the Court sitting without a

jury wherein a Summary Judgment was granted to the Plaintiff.

RELIEF SOUGHT ON APPEAL

Plaintiff asks the Court to sustain the Judgment granted herein by the Fifth Judicial District Court.

STATEMENT OF FACTS

The Plaintiff is a resident of Washington County, Utah, and was resident of said county up to commencement of this action. The Defendant is a Utah corporation with real property holdings in Iron County, Utah.

On or about the 18th day of May, 1972, the Plaintiff and Defendant entered into an agreement for certain work to be performed by Plaintiff requiring the Plaintiff to perform as follows:

a. Plaintiff to supply all labor necessary to lay brick on the 60 unit village apartment complex under construction in Cedar City, Iron County, Utah, situated upon the certain real property belonging to the Defendant, hereinafter described.

b. Said Defendant agreed to pay Plaintiff $160.00 per thousand bricks laid by Plaintiff.

c. Plaintiff was required to furnish all necessary ties.

d. Plaintiff was required to follow the plan provided by said Defendant and further required to cooperate with

Defendant in working out any changes or variations necessary and desirable to complete the job attractively so long as Plaintiff was not required to re-do work already installed, with it further being agreed that all alterations or changes would be submitted to Plaintiff by said Defendant's job superintendant.

e. Plaintiff was required to commence work pursant to said agreement on the 22nd day of May, 1972 with at least two skilled brick layers and appropriate laborers and further required as work progressed to provide one or two additional men to allow completion of said brick work in a timely manner and to avoid delaying other trades.

f. Plaintiff was required to furnish, erect, and dismantle all scaffolding.

g. Said Defendant was required to furnish all mortar, material, steel and other necessary supplies except ties required for completion of the work.

h. Said Defendant agreed to provide a hoist for the use of Plaintiff and his employees.

i. Said Defendant agreed to pay Plaintiff by the 10th of the month for work performed during the thirty (30) days immediately preceding, less a ten percent (10%) retainer to be held by the Defendant until completion of the brick work by Plaintiff.

On or about the 2nd day of October, 1972 the Plaintiff did cause a Notice of Lien to be recorded in the Iron

County Recorders office, in Book 176 at pages 428-429 against the real property of the Defendant located in Iron County, Utah and described as follows:

> COMMENCING North 89° 37′ East 300 feet from the Northwest corner of Section 23, Township 36 South, Range 11 West; North 89° 37′ East 506 feet; thence South 45° 37′ West 706.6 feet; thence North 0° 07′ West 490.9 feet to the place of beginning.

Pursuant to said Contract, Plaintiff laid all the bricks required to complete project and was paid $15,200.00 for said work. The Court found Plaintiff laid 128,500 bricks and was entitled to a total payment of $20,560.00, leaving a balance owing of $5,360.00 plus interest.

The Court awarded the Plaintiff a reasonable attorney's fee in the sum of $1,052.00. The Court found it had jurisdiction over the action and that Defendant had failed to file a Motion for Change of Venue.

ARGUMENT

POINT I.

SUMMARY JUDGMENT WAS PROPERLY GRANTED WHEN DEFENDANT'S AFFIDAVITS DID NOT PRESENT COMPETENT EVIDENCE TO CREATE TRIABLE ISSUES OF FACT.

Defendant's Brief (page 5) asserts that factual dis-

putes existed with respect to (1) number of bricks laid, (2) method of determining same, and (3) whether the brick count is to include pieces of bricks laid. Defendant makes no claim that any other factual issues exist. Defendant's Brief goes outside the record in making area computations (Brief, page 5) and this should be disregarded, since it was not raised by timely Affidavit.

Examination of Defendant's Affidavits shows that they generally fail to comply with the requirements of Rule 56, relating to Summary Judgment.

Defendant relies in part on the Affidavit of Gary J. Willey (R. 57). It should be noted that this Affidavit was not timely, since it was dated about 6 weeks *after* the Judgment. A further defect is that it contained no competent evidence bearing on the issues involved in the Motion for Summary Judgment. For example, it sets out an alleged opinion of personnel from the Department of Contractors (whom it does not name) that Defendant's calculations are correct. Such evidence is subject to the objections of hearsay, lack of foundation, and immateriality, and it would not hve been admissible at the trial. Next the Affidavit alleges in substance that Plaintiff disagreed with Defendant's brick count. The bare fact of such disagreement has no probative value, and is an obvious observation; there would have been no lawsuit if the parties had been in full agreement. The Affidavit does not set forth what the brick count was, who did it, that the method was the one the parties contemplated, or any other matters on personal knowledge

which would have been specific, relevant, and admissible. For these reasons, and because it was late, it should not be considered.

The Affidavit of Robert Richins (R. 29) dated February 21, 1972, was timely, but also inadequate. The firstparagraph merely asserts a factual issue exists, and Defendant admits (Brief, apge 6, line 3) that such an assertion is insufficient to preclude granting a Motion for Summary Judgment. The second paragraph complains of Plaintiff's refusal to cooperate in certain proposals "regarding the counting of the brick", which are not further described as to date or nature of proposal, or reason for refusal. In any event, this would be immaterial, since it has no probative value in determining how much is owed.

The next Affidavit is that of the attorney, Carl T. Smith, dated February 15, 1973 (R. 24) which again states the general conclusion that material issues of fact exist, as set forth in the interrogatories, but contains nothing else germane to the issues of this appeal.

Since the Defendant's answer was not verified, the assertion that genuine issues of fact exist can only rest on the answers to interrogatories dated December 20, 1972, and signed by Carl T. Smith and Robert Richins (R. 16, 17, 18). The only answers that have any bearing on the issue of computing the amount due are Nos. 1, 2, and 7. The first answer states that 140,238 bricks were delivered to the jobsite, but this does not contradict Plaintiff's Affidavit that he laid a minimum of 128,500.

The second answer attempts to account for 32,500 bricks as not laid by Plaintiff, and while the answer complies with the standard for discovery (hearsay, and that which might lead to admissible evidence), it fails to meet the more rigorous standard for Affidavits under Rule 56, and shows the hazard in expecting interrogatory answers to do double duty. Paragraph "C" is admittedly a hearsay statement by Fred Kessler. Paragraphs "A" and "B" pertain to bricks laid by Elmer Wood, and there is no showing that either affiant, Carl T. Smith, the attorney, or affiant Robert Richins had any first-hand knowledge of the amount. Paragraph "D" alleges a gift of 2,000 brick to Jim Heath by Sid Miller "without the knowledge of REMCO, Inc.," and thus on its face appears to be a repetition of hearsay. There is no showing that neither Richins nor Smith would be competent to testify to any of these matters on the witness stand. Nor did Defendant submit any Affidavit from Kessler, Heath, Miller or Wood.

Civil Rule 56 (e) states that,

> "Supporting and opposing Affidavits shall be made on a personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that *affiant* is competent to testify to the matters stated therein." (Emphasis added.)

The Affidavit of the Plaintiff, Brian Humphries, dated February 5, 1973, and in support of the Motion for Summary Judgment, state sthe specific facts establishing

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The Affidavit of the Plaintiff, Brian Humphries, dated February 5, 1973, and in support of the Motion for Summary Judgment, state sthe specific facts establishing

his claim: that he laid a minimum of 128,500 bricks in compliance with the contract attached to his Affidavit, which entitled him to 16¢ per brick, for a total of $20-560; and that $15,200 had been previously paid. Although the Affidavit contained a mistake in calculation from these figures, it was readily apparent, and was corrected in the judgment, which was for the correct sum of $5,-360.00.

It may be noted that not only did Defendant fail to controvert Plaintiff's Affidavit by Affidavits containing admissible evidence from competent witnesses, but Defendant's counsel continually defaulted by not appearing to defend this action. As the minute entries demonstrate, on the crucial dates of February 27, 1973 and February 28, 1973, when Plaintiff's Motion for Summary Judgment came up for hearing, Defendant did not appear. At that time the Court granted judgment to Plaintiff against the Defendant, REMCO, Inc., but denied judgment against the Defendant Robert Richin.

On April 13, 1973, Defendant's Motion for Stay of Proceedings and Set Aside Amended Judgment and for Dismissal of Plaintiff's Complaint. Once again the Defendant failed to appear or be represented. Therefore the Court overruled Defendant's Motion and Amnded Findings of Fact and Conclusions of Law and Amended Judgment were filed with the Clerk. Finally on July 13, 1973, the matter came before the Court upon Plaintiff's exception to Sureties and the Defendant failed to appear

or be represented by Counsel and the bond of Defendant was vacated.

On the five times this matter came before the Court the Defendant chose not to appear and in the Amended Findings of Fact and Conclusions of Law the Court, in the Preamble, specifically found ". . . . Defendant having failed to appear or be represented and the Court having granted said Motion for Summary Judgment . . . ." Therefore, the Judgment granted by the Court was in the nature of a Default Judgment as well as Summary Judgment.

POINT II.

ANY RIGHT WHICH DEFENDANT HAD TO ENFORCE THE ARBITRATION CLAUSE WAS WAIVED BY FAILURE TO DEMAND ARBITRATION PRIOR TO JUDGMENT ON THE MERITS.

Paragraph 14 of the contract between the parties provides, inter alia:

> "14. DISPUTES: In the even of any dispute between the Contractor and Subcontractor covering the scope of the work, the dispute shall be settled in the manner provided by the contract documents. If none be provided, or if there arises any dispute concerning matters in connection with this agreement, *and without the scope of the work*, then such disputes shall be settled by arbitration . . . ." (Emphasis supplied.)

It is clear that Plaintiff's lawsuit concerned matters *within* the scope of the work he performed, which raises an initial question as to whether the above quoted provision even applies to our case. Either the provision was defectively drafted, in which case it should be wholly disregarded for vagueness, or by its terms it operates only as to matters "without the scope of the work," which excludes our case from its requirements.

Even assuming, arguendo, that Defendant had the right to demand arbitration at some point, its conduct in (1) not demanding arbitration prior to litigation being commenced; and (2) not demanding arbitration in its answer, corrected answer, or responses to Plaintiff's Motion for Summary Judgment, clearly waived any arbitration right which it may have had. The first mention of arbitration in this litigation was made by Defendant on April 19, 1973 *after* Judgment. No authority supports Defendant's claimed right to arbitrate at the late date.

As stated in *Giannopulos* vs. *Pappas*, 8 U. 442, 15 P. 2d 353, 356 (1932), the law favors arbitration as a speedy and inexpensive method of adjudicating differences, and the purpose of the (arbitration) law is to avoid delays incident to legal action. It is obvious that this salutary policy would be wholly thwarted if one were permitted to litigate a dispute in the Courts, and then, disappointed with the result, attempt to gain a second shot by compelling arbitration. Such procedure, if permitted, would increase delay and expense of adjudication, rather than

decreasing it, and would also permit parties to gamble on a forum.

The cases cited in Defendant's brief are distinguishable in that in all of them arbitration was demanded at the pleading stage, by answer or petition, and enforcement was requested prior to Judgment on the merits. Most of those cases are analyzed in 25 A. L. R. 3d 1220-1222, where it appears that even they represent a minority view. The majority cuts off the right to compel arbitration at an earlier point in time, and holds that if the litigation machinery has been "substantially invoked" and the parties are "well into the preparation of a lawsuit," the right to arbitration has been waived. 25 A. L. R. 3d 1216-1220.

A substantial number of cases have held that failure to raise the right to arbitrate in the answer constitutes a waiver of this right. *Finlayson* vs. *Waller*, Idaho 1943, 134 P. 2d 1069, 1071; *Landreth* vs. *South Coast Rock Co.*, California 1934, 29 P. 2d 225, 226; *Almacenes Fernandez, S. A.* vs. *Golodetz*, (C. A. 2 N. Y.) 148 F. 2d 625, 161 A. L. R. 1420. In the California case relied on by Defendant, *A. D. Hoppe Co.* vs. *Fred Katz Construction Co.*, 249 Cal. App. 2d 154, 57 Cal. Rptr. 95, (1967), 25 A. L. R. 3d 1162, the Defendant filed a "Motion for Order Compelling Arbitration" in lieu of an answer, and in timely response to the Complaint, thus raising this defense at the first opportunity. This case is in accord with the general rule in this respect, and does not support the

novel position of the Defendant in our case, that the defense need not be raised until after judgment. See 25 A. L. R. 3d 1171 (1969).

For these various reasons, Defendant's tardy effort to invoke arbitration should be held ineffectual. To permit its use under the circumstances of this case would encourage future misuse of the arbitration procedures, would increase delay and expense of litigation, and would encourage multiplicity of actions.

POINT III.

ATTORNEY'S FEES WERE PROPERLY AWARDED TO PLAINTIFF PURSUANT TO U. C. A. 38-1-18 AS THE SUCCESSFUL PARTY.

Defendant erroneously assumes that Plaintiff's claim for attorney's fees was based on Rule 56 (g) or as punitive damages. The statute granting a right to attorney's fees is Utah Code Annotated 31-1-18, which states:

> "In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the Court, which shall be taxed as costs in the action."

Plaintiff's Complaint alleges the timely filing of a lien in the Iron County Recorder's Office, and this is admitted in the Answer. While the Complaint does not ask for foreclosure expressly, it does set forth all the elements which would entitle Plaintiff to foreclosure,

and asks, in the prayer for relief, for attorney's fees, costs of suit, and "such other and further relief as to the Court seems just in the premises." A fair reading of the pleadings shows clearly that this is an action brought to enforce a lien within the meaning of the statute.

It is submitted that this and similar statutes (for example, U. C. A. 34-9-1: suit for wages) are remedial in purpose to permit claimants with modest means to collect just claims without incurring large collection expenses. A mechanic's lien, like a mortgage, is simply security for a claim or debt, and can be "enforced" in various ways, one of which is foreclosure. To effectuate the purpose of such statutes, which is to see that the debt is collected, Courts have not imposed a rigid requirement that the "successful party" have succeeded by foreclosing a lien. In the Oklahoma case of *Detroit Graphite Co.* vs. *Carney*, 53 P. 2d 585, 587, under a similar statute the Court noted that a lien claimant could recover an attorney's fee even though the lien had been discharged, and a bond substituted for it. Since the lien claimant in that case failed to prove his claim, attorney's fees were awarded to Defendants.

Similarly, in *Smith* vs. *Faris-Kesl Construction Co.*, 150 P. 25, 30, the Idaho Court interpreted a similar statute as permitting the lien claimant to obtain personal judgment for attorney's fees against the contractor, which had no interest in the property subject to the lien. Thus, in neither case did the right to attorney's fees depend on actual foreclosure of the lien.

In our action the filing of a valid lien was established by the pleadings, and the action was to enforce that lien, and the claim it secured. Plaintiff was the successful party in the means of enforcement which he selected, and no issue has been raised as to the reasonableness of the attorney's fees which were awarded; in fact, Defendant did not appear at the hearing or present any evidence on this issue. It is submitted therefore, that the Judgment for attorney's fees should be affirmed.

CONCLUSION

Although Defendant claims that a factual dispute existed, examination of Defendant's Affidavits shows that they do not comply with Rule 56, Utah Rules of Civil Procedure, and consist of hearsay and irrelevant matter, and the record further indicates that Defendant recurrently defaulted in the Court below by failing to appear to support its position.

As for Defendant's tactic in attempting to shunt this matter into arbitration, it comes after Judgment and hence too late; furthermore, the language of the Agreement does not appear to require arbitration at any stage.

Defendant also objects to an award of attorney's fees for the first time on appeal. Attorney's fees were proper under the language of Utah Code Annotated 31-1-18, and the remedial policy of such statute to help workmen collect their just claims, without having their gains wiped out by legal costs and fees.

For these reasons, Summary Judgment was proper and should be affirmed.

Respectfully submitted,

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