

1969

Roberts Investment Company, a Utah Corporation
v. Gibbons and Reed Concrete Products Company,
a Corporation and Gibb0Ns and Reed Concrete
Products Company, a Corporation v. Frank W.
Roberts and W. Calvin Roberts dba Roberts
Investment C0Mpany, et al. : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERTS INVESTMENT COM-
PANY, a Utah corporation,
Plaintiff and Respondent,

v.

GIBBONS AND REED CON-
CRETE PRODUCTS COMPANY,
a corporation,
Defendant and Appellant,

GIBBONS AND REED CON-
CRETE PRODUCTS COMPANY,
a corporation,
Plaintiff and Appellant,

v.

FRANK W. ROBERTS and W.
CALVIN ROBERTS dba ROB-
ERTS INVESTMENT COM-
PANY, et al.,
Defendants and Respondents.

Case No.
11254

APPELLANT'S BRIEF

NATURE OF CASE

This is a consolidation of two separate actions, one brought by respondent for slander of title, the other by appellant for foreclosure of a mechanic's lien and a money judgment for failure to obtain the bond required by 14-2-1 Utah Code Annotated 1953.

DISPOSITION IN LOWER COURT

The trial court, after a trial without a jury, dismissed the claims of all parties.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment and remand with directions to enter judgment against respondents for \$1,561.68, interest, and costs, including an attorney's fee of \$750.00.

STATEMENT OF FACTS

The respondents, Frank W. Roberts and W. Calvin Roberts, co-partners doing business as Roberts Investments (hereinafter called "Roberts") owned real property at 3838 South Main Street, Salt Lake City, upon which they undertook to construct a building (R. 16), anticipating construction costs of approximately \$200,000.00 (R. 48).

In carrying out the project Roberts employed several contractors to do different portions of the work (R. 48). Among the contractors was American Construction Company, which was to be responsible for erection of the concrete walls for the building. This portion of the contract itself involved more than \$500.00 of construction costs, but Roberts did not require American Construction to furnish any performance and payment bond (R. 16).

Between February 19, 1964, and April 15, 1964, American Construction Company ordered and received concrete from appellant for use in construction of the Roberts building, but on about the later date, the contractor ran into construction problems, and dropped two walls, causing damage. Roberts stopped American Construction from further performance and took over that portion of the work itself (R. 52-53). Between about May 7, 1964, and August 20, 1964, Roberts purchased concrete from appellant of an agreed and reasonable value of \$7,505.64. It was used in construction of the building.

On August 27, 1964, Frank W. Roberts went to appellant's office for the purpose of paying for the concrete it had purchased. Roberts then owed appellant \$7,505.64 for concrete purchased by Roberts for construction of the building. The amount was liquidated and undisputed. No portion of it arose out of the sale of concrete to American Construction Company.

American Construction Company, however, was

then indebted to appellant in the amount of \$1,561.68 for concrete furnished on the project before American's work was taken over by Roberts. The amount owed by American Construction Company was liquidated, was maintained as a separate account, and was recorded on a different ledger card than the Roberts account.

On the day Frank W. Roberts was in appellant's office to pay the Roberts indebtedness both appellant's general manager and its office manager inquired about the debt of American Construction Company.

There is not much dispute about Frank W. Roberts' reaction to inquiries concerning the American Construction Company account. L. K. Bradley, appellant's general manager, testified that Mr. Roberts said he "wasn't obligated" to pay it (R. 36). Jan Zwets, appellant's office manager, testified that Mr. Roberts said it "was our problem to straighten out with American Construction" (R. 44). Frank Roberts himself testified that he told Zwets, "I am not going to pay anything that American Construction owes," and that Zwets could "either sign the lien waiver and I will pay this [the Roberts debt], or forget it" (R. 55). The testimony of Zwets was that "I told him I would sign a lien release for the amount owed Gibbons and Reed by Roberts Investment" (R. 42). Zwets then signed a receipt for \$7,505.64 (Exhibit D-1) which contained lien release provisions aimed primarily at protection of the construction lender, Valley State Bank.

Frank W. Roberts admitted that he paid appellant

the exact amount owed for concrete purchased by Roberts. Although there had been "a couple of discrepancies" these had been discussed and Roberts was satisfied that the bill rendered was a proper bill. He also knew that the claim for \$7,505.64 did not include any amounts of concrete purchased by American Construction Company while it was on the job. Nevertheless, he told Jan Zwets that unless he signed the receipt he would not be paid the amount admittedly owed by Roberts (R. 61).

The document signed by Jan Zwets on August 27, 1964 (Exhibit D-1) is in the form of a receipt. Untitled, it reads as follows:

"Salt Lake City, Utah 8/27 1964

Received of Roberts Investments the sum of Seven Thousand & Five Hundred & Five—& 64/100 DOLLARS (\$7,505.64) in (*full*) payment for labor and/or material furnished by the undersigned for the job at 3838 South Main Street, Salt Lake City, Utah.

It is understood that this receipt is to be presented to VALLEY STATE BANK or assigns as evidence of payment of the amount thereby receipted for to induce said VALLEY STATE BANK or assigns to advance to the owner of the property above mentioned money to be secured by mortgage on said property, and, in consideration thereof, it is agreed by the undersigned with the VALLEY STATE BANK or assigns that any lien the undersigned has or may have against real estate is and shall be inferior, subordinate and subsequent to said

mortgage; and further, and disputes over amounts due and/or material delivered heretofore between claimant and owner are waived and settled and the undersigned releases the owners from all and any claims the undersigned may have against owner or materials delivered or labor performed. For materials delivered to date. 8/20/64.

**GIBBONS AND REED CONCRETE
PRODUCTS COMPANY**

Jan Zwets, Office Manager

This Payment Covers Concrete Mat."

A few days thereafter, on September 2, 1964, appellant filed a mechanic's lien claim against the property (R. 21) for the amount owed by American Construction, \$1,561.68. The claim was inaccurate in that it showed the first material to have been furnished on May 7, 1964, "to" Roberts Investments. Nothing was said about material furnished between February 19, 1964, and April 15, 1964, at the request of American Construction Company. On or about February 22, 1965, an amendment of claim of mechanic's lien was filed with the County Recorder in which the error was corrected (R. 22-23)¹.

During the trial it was stipulated that if appellant was entitled to an attorney's fee, such fee should be fixed in the amount of \$750.00 (R. 47).

1. The amended lien was filed to notify third persons of the exact basis for appellant's claim of lien. Appellant does not contend that the amendment could validate the original lien if it was not valid when filed.

On March 13, 1968, the court filed a Memorandum Decision (R. 28-29) in which it found, among other things, that the release "was a release of all claims and, therefore * * * that a judgment of no cause of action should be rendered in favor of the [respondent] on [appellant's] claim." This appeal involves only Gibbons and Reed Concrete Products Company and Roberts Investments. By stipulation of the parties the lien was released and the sum of \$2,400.00 was placed on deposit to await further order of the court. Any judgment entered, to the extent that the fund is available, will be paid out of the fund or a supersedas bond given in lieu of it. No appeal has been taken by any party other than Gibbons and Reed Concrete Products Company.

ARGUMENT

I

THERE WAS NO CONSIDERATION FOR A RELEASE BY APPELLANT OF ANY CLAIM OTHER THAN THAT ARISING FROM THE ROBERTS INVESTMENTS ACCOUNT.

The trial court without explanation or apparent reason refused to apply contract principles which have been recognized by the Anglo Saxon courts for centuries and by this court since its inception. Courts, text-writers, legal encyclopedias and college professors agree that promises and releases, to be enforceable, must be

supported by sufficient consideration². Restatement of Contracts, §19; 1 Corbin on Contract, §109; 17 C.J.S., Contracts, §§71, 402; 17 Am. Jur.2d, Contracts, §86; 76 C.J.S., Release, §10; 45 Am. Jur., Release, §11.

Few material facts are in dispute. It is established by the pre-trial order and trial testimony that on August 27, 1964, Roberts owed appellant \$7,505.64 for concrete used by Roberts in construction of its building. The amount of the debt was liquidated, agreed to, undisputed, and not subject to any reasonable dispute. Yet the trial court held that payment of the debt by Roberts operated to discharge that company from an entirely separate liability arising out of appellant's sales to American Construction Company.

The ruling of necessity rejects the principle that performance of a pre-existing legal duty does not constitute consideration for a promise or release.

In *Tanner v. Utah Poultry & Farmers Cooperative*, 11 Utah 2d 353, 359 P.2d 18 (1961) this court had occasion to consider the effectiveness of an instrument signed by Ray Tanner which purported to "release and discharge" the cooperative "from any and all debts, claims, demands and accountings of whatsoever name, nature and description," except sums payable under

2. We recognize that some promise are enforceable without consideration, i.e., those under seal in some states, and those giving rise to a "promissory estoppel." We have limited the discussion to consideration because no basis other than "sufficient consideration" was relied upon by the court in enforcing the release (R. 17-19). Although the question of estoppel was raised in the pre-trial order (R. 18), no evidence was introduced to support it.

some certificates of interest. The release was dated October 7, 1952, and recited that the payment represented the "balance owed to me under the marketing of my 1951 crop of turkeys." After signing the release plaintiff brought an action against the cooperative for balances owed for marketing his turkey crop between 1942 and 1951. The cooperative's defense that the claims had been released was upheld in a summary judgment but this court reversed on two grounds, one of them that there was no consideration for the release. The court said:

"* * * There was no consideration for the release of obligations arising out of transactions other than the marketing of the 1951 turkeys. For defendants did only what they were otherwise obligated to do. The release expressly recites that the payment was made as the balance owing for marketing the 1951 crop of turkeys. On the face of the instrument it expressly appears that the payment was made to liquidate that obligation, which defendants agreed was the balance owing thereunder. All of the other evidence tends to indicate that such was the fact and that the parties had agreed to the amount owing for the 1951 crop. All of the additional evidence * * * definitely tends to indicate that the amount paid was the exact amount which defendant's books showed that it owed plaintiff for the 1951 crop, and that plaintiff agreed to this figure after defendants had produced all their books and plaintiff's employees had twice audited such books. *The payment being for the exact amount which the parties had agreed was owing to plaintiff from the marketing of his*

1951 turkeys, there was no consideration given for the release of any other liability which defendants owed to plaintiff.” [Emphasis added.]

The present case cannot be distinguished. The amount paid by Roberts Investments was the exact amount the parties had agreed was owing to appellant for concrete sold to Roberts Investments on its own account.

In *Brimwood Homes, Inc. v. Knudsen Builders Supply Co.*, 14 Utah 2d 419, 385 P.2d 982 (1963), a savings and loan company had made a payment and obtained a release from a materialman. In an action to foreclose a mechanic’s lien the claimant contended that it was the intention of the parties to release lien rights only as to amounts set forth in the authorization, and that there was no consideration to support the promise to release any other lien rights that might be acquired thereafter. This court upheld the contention, saying:

“* * * It must be noted that the defendant, in receiving the payments from Prudential, was being paid no more than what it was legally entitled to at the time. Thus, a promise by the defendant to waive rights to future liens for other debts would be without consideration.”

A recent case applying the rule to a claim arising under 14-2-1 Utah Code Annotated 1953 (the private bonding statute) is *Pierce v. Pepper*, 17 Utah 2d 123, 405 P. 2d 435 (1965). There the plaintiffs, employees of a contractor, had been paid with worthless checks.

Subsequently they went to the defendant builder who paid them for part of their work on condition that they sign releases and lien waivers for everything. Respecting the transaction this court said:

“Having violated [the bonding statute], under the facts of this case, there was no consideration for the waivers, and the failure to require the contractor to file a bond to protect these workers under the plain wording of the statute, cannot ameliorate the obligation of the builder from its terms, by any no consideration David Harum negotiation with the workers.”

The above cases decided by this court are in accord with Restatement of Contracts, §76:

“Any consideration that is not a promise is sufficient to satisfy the requirement of §19(c)³, except the following:

“(a) An act of forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promisor or the public, or, if imposed by the law of torts or crimes, is owed to any person; * * *

Illustration No. 5 following the quoted rule, could have been adopted from the facts in our case:

“A owes B a liquidated and undisputed debt of \$100. B has another claim against A, the existence or amount of which is honestly and reasonably disputed by A. A pays B \$100 in

³ Section 19(c) provides that a “sufficient consideration” is one of the requirements of law for the formation of an informal contract.

return for B's agreement to accept the payment in full satisfaction of both claims. There is not sufficient consideration for B's agreement, since A has paid only what he was under a duty to pay."

The rule is similarly stated in 76 C.J.S., Release, §14:

"A release of a legal obligation for which the consideration is the performance by the releasee of some undisputed legal duty owing by him to the releasor or to a third person is invalid for want of consideration. * * * So the full payment of an admitted debt or the full performance of one obligation is not consideration of a release of a second debt or obligation."

Accord: 45 Am. Jur., Release, §13.

The rules as set out above are supported by an annotation, "Payment of undisputed amount or liability as consideration for discharge of disputed amount or liability," 112 A.L.R. 1219, 1224, wherein it is pointed out that there is very little conflict of authority on the question of "whether payment of an undisputed claim is a consideration for the discharge of another distinct and independent disputed claim."⁴ The general rule is that it is not.

The facts in the present case are not novel, and there is no apparent reason why the rule of law should

4. The annotator points out that there is a conflict of authority on the question of whether payment of the conceded part of a single claim is sufficient consideration for release of the disputed balance. That situation is not involved here.

not be applied. The payment made by Roberts was for concrete it purchased from appellant after taking over the contract work. The payment could not be consideration for release of claims founded upon independent transactions between appellant and American Construction Company, which arose by virtue of the lien law (Title 38, Chapter 2, Utah Code Annotated 1953) and a statute requiring owners to obtain performance and payment bonds when undertaking substantial improvements on their property (Title 14, Chapter 2, Utah Code Annotated 1953).

[It should be noted, also, that this was not a case in which a debt was paid before it was due, or where a debtor agreed to forego bankruptcy in exchange for a release. The evidence is that Frank W. Roberts refused to pay the amount admittedly due unless appellant's office manager signed the release. There was no bargaining about due date or early payments. To constitute consideration, an act or forbearance must be "bargained for and given in exchange for the promise." Restatement of Contracts, §75.]

II

THE COURT ERRONEOUSLY CONSTRUED THE RECEIPT AS A RELEASE OF ROBERTS INVESTMENTS FROM LIABILITY.

The receipt signed by appellant's office manager, reprinted herein at pages 5 and 6, should not have been

construed as operating in favor of Roberts with respect to the American Construction Company debt. It purports to be an agreement with Valley State Bank, not with Roberts; and virtually all of the language is aimed at protecting Valley State Bank, the construction mortgagee.

If the release is determined to be ambiguous, appellant's position is aided by conversations that took place when the receipt was given. At no time during these conversations was it contended by Frank W. Roberts that the receipt was to protect him and his partner with respect to the American Construction Company debt. His attitude was that the claim was not his concern. He said the account was none of his business, he didn't intend to pay it, and appellant would have to work it out with American Construction. Not once did he say that he intended the receipt to operate as a release of the American Construction Company debt. He must have believed that the partnership was not liable for the American Construction Company debt—and that a release of it was not necessary. Otherwise, his conduct would amount to intentional deception.

The receipt having been prepared by Roberts, any ambiguity should be resolved against it. The use of the exact figure owed by Roberts Investments to appellant, \$7,505.64, would indicate that it was not intended to cover other independent claims. The language in the receipt is no broader than that considered by this court in *Tanner v. Utah Poultry & Farmers Cooperative*, 11

Utah 2d 353, 359 P.2d 18 (1961), discussed, supra., in connection with consideration. The second ground for reversal of the *Tanner* case was that the trial court had misconstrued the release and had applied it too broadly in light of the circumstances and recitals, respecting which this court said:

“The release recites that in consideration of the payment of \$9,350.00 from the cooperative ‘(being the balance owed to me under the marketing of my 1951 crop of turkeys) receipt of which is acknowledged, I do hereby release and discharge the said cooperative from any and all debts, * * *’ The release clearly states that the \$9,350.00 from the cooperative was the balance owing Tanner under the marketings of his 1951 crop of turkeys, payment of which he acknowledged. This would suggest that the release deals with obligations of the cooperative arising out of its marketing Tanner’s 1951 crop of turkeys. While the words dealing with the release do not confine it strictly to obligations arising out of the 1951 marketing when read in connection with the preceding part of the sentence, it clearly suggests that such was the intention of the parties. In view of this fact we conclude that the release was ambiguous on this question, and that the plaintiff was entitled to introduce evidence, which showed that it was the intention of the parties that the release was only of liability arising out of the 1951 marketing of turkeys.”

The evidence introduced in this case indicates that there was no bargaining between appellant and respondent respecting the application of the release to the indebtedness arising out of the American Construc-

tion Company purchases. Frank W. Roberts simply denied that Roberts Investment had anything to do with that obligation. There was no suggestion that Gibbons and Reed should release the obligation in exchange for the payment due, but only that it should sign the receipt. In light of the fact that the language of the receipt is directly primarily toward protection of Valley State Bank, and the promises in it appear to run to Valley State Bank, the court erred in construing the instrument as a release of appellant's separate claim against Roberts.

III

APPELLANT IS ENTITLED TO A JUDGMENT IN THE AMOUNT OF ITS CLAIM, INTEREST, AND ATTORNEY'S FEES.

In this brief, Point III is a consolidation of Points IV and V of the statement of points filed with the designation of record on appeal. It is based upon the ground that appellant is entitled to judgment under both the lien law and the private bonding statute.

Pursuant to the parties' stipulation, a deposit in court will be applied to any judgment recovered by appellant under either statute. It makes no difference therefore, whether appellant's recovery is based upon the lien law or the bonding statute, unless it is decided that attorney's fees are not allowable in an action based upon failure to obtain a bond.

Appellant clearly is entitled to judgment under 14-2-2 Utah Code Annotated 1953⁵ unless the receipt was effective as a release of that liability. The building as contemplated and constructed by Roberts as owner exceeded the sum of \$500.00; the portion to be constructed by American Const ruction Company exceeded \$500.00; and the contractor was not required to furnish any bond at all. No question of timeliness having been raised, the pre-trial order (R. 15-17) contains all of the facts necessary to support a judgment under the bonding statute.

Prior to 1963 the bonding statute contained only two sections, one providing for an action on the payment bond, the other permitting an action against the owner for failure to require a bond. The section added 1963 (14-2-3 Utah Code Annotated 1953) provides:

"In any action brought upon the bond provided for 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."

Although there is no express provision for attorney's fees in an action for failure to require a bond, the sections should be construed in light of their obvious

5. "Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond * * * shall be personally liable to all persons who have furnished material or performed labor under the contract for the reasonable value of such material furnished or labor performed, not exceeding, however, in any case the prices against upon. Actions to recover on such liability shall be commenced within one year from the last date the last materials were furnished or the labor performed."

purpose, i.e., to protect laborers and materialmen who improve real property, and to encourage owners to require bonds. To achieve this purpose and avoid an anomolous situation, 14-2-3 should be construed as applying not only to actions on bonds, but to actions against owners for failure to require bonds.

Regardless of the construction placed on 14-2-3, appellant is entitled to an attorney's fee under 38-1-8 Utah Code Annotated 1953, part of the mechanic's lien law. Under the admitted and stipulated facts, appellant was entitled to judgment foreclosing its lien unless two errors in the original lien were such as to invalidate it. The errors were (1) a statement that the first material was furnished on May 7, 1964, rather than on February 19, 1964; and (2) a failure to state that the material delivered between February 19, 1964, and May 7, 1964, was furnished at the instance and request of American Construction Company rather than Roberts Investments.

The above errors in appellant's claim of lien fall far short—in quantity and magnitude—of those considered by this court in *Chase v. Dawson et ux.*, 117 Utah 295, 215 P.2d 390 (1950). The contention in that case was that the lien was insufficient because it failed to state the nature and amount of materials furnished, the use to which the materials were applied, to whom the same were delivered, the terms and conditions of the contract, and whether the one with whom the claimant made the oral contract was an agent, contractor,

or otherwise. Notwithstanding these objections the court upheld the lien, saying:

"The notice of lien is no model. However, substantial compliance with the statute is all that is required * * *

"The instrument here in question clearly shows that the building materials were furnished to the owner, the first named defendant, and used 'on and about the house on said land,' which is fully and legally described by lot and subdivision. The notice recites that the materials were furnished to the owner Kirby S. Dawson, so that it matters not whether the materials were ordered by the general contractor, or as to who signed for them on the job."

In *Hammond Lumber Co. v. Richardson*, 94 Cal. App. 119, 270 Pac. 751 (1928), the Supreme Court of California upheld a lien although it incorrectly designated the contractor as an individual rather than a corporation. The court took the view that the lien law should be liberally construed to effectuate its purpose, and that injury from the misstatement is not to be presumed.

In *Cook, Borden & Co., Inc. v. R. Z. L. Realty Corp.*, 50 R. I. 375, 147 Atl. 891 (1929) the court took the position that correction of a delivery date on a claim of lien is permissible when the date as corrected still leaves the delivery within the required period, there being no "substantial alteration of the account."

In *Central Construction Company v. Highsmith et al.*, 155 Neb. 113, 50 N.W.2d 817 (1952) the court

had occasion to consider a mechanic's lien which had been objected to because of errors in the names of the persons for whom the work was done, and the dates upon which the first and last materials were furnished. The court noted that the object of the lien law is to secure the claims of those who have contributed to the erection of the building and that the legislation should receive the most liberal construction giving full effect to the provision. If errors are trifling and immaterial, or if they are readily explainable as the result of mistake, and no element of willfulness appears, the court said, regard will be had for the imperfections of human machinery, and the recovery of a just debt will not be denied where nothing but fair dealing was intended. The court then concluded that the three objections to the lien were not valid since the errors were trifling and immaterial.

Another case upholding liens against errors found not to be substantial and prejudicial, and announcing the rule of liberal construction, is *Peccole et al v. Luce & Goodfellow, Inc., et al.*, 66 Nev. 360, 212 P.2d 718 (1949). See also *Ellis-Mylroie Lumber Co. Co. v. St. Luke's Hospital et al.*, 119 Wash. 142, 205 Pac. 398 (1922).

The errors in the mechanic's lien in this case were not such as might prejudice the respondents; moreover, the errors were understandable since Roberts, after taking the job, continued to use the same personnel, including the supervisor, that had been employed by

American Construction Company. Under cross examination Frank W. Roberts admitted that as soon as he discovered that the lien had been filed he knew that it related to the concrete furnished to American Construction Company, which had been the subject of discussion on August 27, 1964.

CONCLUSION

The present case cannot be distinguished from numerous cases, decided by this court and others, holding that the performance of a pre-existing legal obligation is not good consideration for a promise or a release.

On August 27, 1964, Roberts paid appellant a liquidated amount it admittedly owed. There was no bargaining between the two companies with respect to the release of any other claim, and it is apparent from the conversations that there was no intention on the part of either the appellant or Roberts to contract with respect to either the claim against American Construction Company, or the liability of Roberts arising out of the lien and the private bonding statutes.

The trial court should not have construed the receipt as releasing Roberts Investments from any liability other than the \$7,505.64 account for which payment was made. If the receipt is so construed, there was not sufficient consideration for it, and appellant is not bound by it.

The findings of fact and conclusions of law (R. 17-19) contain no justification for the holding that there was "sufficient consideration" for the release, and the decision was not based upon evidence adduced at the trial or on the application of ruling case law to the facts established.

The judgment should be reversed and the case remanded to the District Court of Salt Lake County with directions to enter judgment in favor of appellant and against respondents for the amount of the lien claim, together with attorney's fees as stipulated, interest, and costs of the action.

Respectfully submitted,

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