

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. : Respondent's Brief

Utah Supreme Court

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In The Supreme Court of the State of Utah

ROBERTS INVESTMENT COMPANY,
A Utah corporation,
Plaintiff and Respondent,

- vs. -

GIBBONS AND REED CONCRETE
PRODUCTS COMPANY, a corporation,
Defendant and Appellant,

GIBBONS AND REED CONCRETE
PRODUCTS COMPANY, a corporation,
Plaintiff and Appellant,

- vs. -

FRANK W. ROBERTS and W. CALVIN
ROBERTS dba ROBERTS INVEST-
MENT COMPANY, et al.,
Defendants and Respondents.

Case No.
11254

RESPONDENT'S BRIEF

Appeal from the Judgment of the District Court
of Salt Lake County, State of Utah
Hon. Stewart M. Hanson

THOMAS P. VUYK
53 East Fourth South
Salt Lake City, Utah 84111
Attorney for Respondents

BRYCE E. ROE
ROE, JERMAN & DART
510 American Oil Building
Salt Lake City, Utah 84101
Attorneys for Appellant

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RESPONDENT'S BRIEF

NATURE OF CASE

The Respondent agrees with the Appellant's description of the nature of the case.

DISPOSITION IN LOWER COURT

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

STATEMENT OF FACTS

The Respondents basically agree with the statement of facts set forth in Appellant's brief. Respondents, however, disagree with the statement set forth in Appellant's brief to the effect that the lien release was primarily aimed at the Valley State Bank as the lien release explicitly and clearly set forth that payment was received from Roberts Investment and further that Roberts Investment as the Owner was released from any and all claims for any materials delivered.

ARGUMENT I

**THE RELEASE SIGNED BY APPELLANTS
WAS A VALID RELEASE OF ALL CLAIMS
AGAINST ROBERTS INVESTMENT.**

The trial court clearly found that the release signed by the Appellant, Gibbons and Reed was a valid release of all claims which Gibbons and Reed had against Roberts Investment Company. The Appellant places all reliance on a question of consideration, in an effort to overturn the ruling of the trial court, alleging that the release signed was without consideration and, therefore, did not release Roberts Investment as to the claim which had arisen by the delivery of materials from the Appellant to American Construction Company for use on the building owned by Roberts. In support of this contention, Appellant's cite **Tanner vs. Utah Poultry and Farmers Cooperative**, 11 Utah 2d 353, 359 P 2d 18, alleg-

ing that that case and the one presently before the court are the same and cannot be distinguished. However, the Tanner case involved several claims all of which were not discussed by the parties and the release signed stated that the release only went to the 1951 crop of turkeys. The Plaintiff's in that case alleged fraud, misrepresentation on several counts. The release was dated October 7, 1952. But the misrepresentations were not discovered until May of 1957 and so there could be no bargain, understanding nor consideration for the release signed by Plaintiff's.

In the question now before the Court, Roberts Investment through one of the partners, Frank Roberts obtained a release of all claims from Appellant only after both of the claims were discussed with Mr. Roberts, and two of the officers of Gibbons and Reed. Mr. Roberts presented the release to Gibbons and Reed and stated that he did not owe the account of American Construction Company, that he was not going to pay the same and that if Gibbons and Reed desired him to pay the debt now they would have to sign a release clearly relieving him of all obligations of any nature whatsoever. Mr. Bradley of Gibbons and Reed read the release after this discussion and told Mr. Roberts to take the release and the check to Mr. Jan Zwets.

Mr. Roberts took the release to Mr. Zwets who again read the release and discussed both accounts with Mr. Roberts and after the discussion took the release and stamped thereon the notation, "for

materials delivered to date 8/20/64", then he affixed the name of Gibbons and Reed Concrete Products Company, signed the receipt, "Jan Zwets, Office Manager" and added, "this payment covers concrete material". He then accepted Mr. Roberts' check and returned to him the release which Mr. Roberts testified was to be given to Valley State Bank to induce Valley State Bank to pay over monies to Roberts Investment.

It is clear from the foregoing facts that there was no fraud, no misunderstanding, and that Gibbons and Reed desired to sign the release and receive the funds presented. This was clearly not the case in *Tanner vs. Utah Poultry*, and, in fact, the situation in the present case is very similar to that presented by this court in **Holbrook vs. Webster**, 7 Utah 2d 148, 320 P 2d 661. In that case, this court held that an unambiguous release of a materialman's lien which was supported by a valuable consideration was not subject to being varied by parol. In this case the court set forth its position as follows:

"The Receipt of Lien Release is supported by a valuable consideration, is unambiguous and is not subject to being varied by parol. There is no contention that the Lien Release and Waiver was procured by fraud or misrepresentation.

Lyle D. Webster filed his affidavit wherein he stated that he signed the Receipt of Lien Release set out herein. He further declared that said Release was "only intended to release the property as the receipted amount is concerned only," and that he did not intend to release any of the remaining balance by reason of the receipt.

We are of the opinion that no genuine issue of fact is presented by the Lien Release. The only issue is one of law. It does not lie in the mouth of Appellant to say that he was mistaken in the legal effect of the Release or that he did not intend that it should be given the only legal effect of which it is susceptible.

Even if the notice of Lien was filed within the time required, the Release of any Lien or right to Lien that Appellant had or might thereafter acquire was effective for the purpose of releasing such lien.

The cases have held that the consideration need only be something of value and the courts will generally, in absense of fraud, coercion and undue influence, and if the parties are competent, not avoid the release on the ground of inadequacy of the consideration for the release. See 76 C.J.S., Release, 19. The value in the case before the Court to the Appellant was in obtaining the money **now** as opposed to later. And as a further strength to this position the Appellant knew that the release was to be given to Valley State Bank as set forth in the terms of the release itself and such testimony was adduced at the trial by Mr. Roberts. (R 54) The trial court found that there was consideration although it did not set forth in detail what this was.

At this point, it should be noted that Gibbons and Reed knew the content of the release which said in unequivocal terms that they were releasing any claims that they had against Roberts Investment and both Mr. Zwets and Mr. Bradley testified that they had read the receipt before it was signed. Mr.

Bradley stating that he authorized Mr. Jan Zwets to sign it. Mr. Bradley further testified that he read the receipt carefully and that there were objectionable words in it but that he did not change any of the words as he felt that they were protecting themselves by dating it up to that time. (R 34-36). Mr. Zwets testified that he read the receipt before he signed it, and when asked if he read that it was release for all goods and materials he answered, "I acted in good faith on this", and then testified he signed the same. The good faith of the Appellant was shown by its immediate filing of a lien after signing the lien release which was clear and unequivocal on its face. Mr. Zwets testified that he was only releasing the Roberts debt, but the trial court must have disbelieved this contention and this court has held that if there is doubt about the correlation of Answers to Interrogatories or testimony it should be interpreted to harmonize with the trial court. **Pace vs. Parrish**, 122 Utah 141.

It is further noted here that there is an analogous position found in some cases which state that where a debt or demand is a fixed and certain amount but where it is uncertain or a matter of dispute which of two persons is liable to pay it, and both deny liability, there is such a controversy as to bring the case within the class of claims which may be satisfied by the payment and acceptance of a less amount than is claimed, and a partial payment by one of such parties may effect a valid accord and satisfaction. 1 C.J.S. Accord and Satisfaction 32 (4). Roberts Investment denied any liability of the debt

owed by American Construction and though this involved two separate accounts it involved the liability of two parties. Gibbons and Reed knew of their denial, understood the dispute fully, took the money offered in good faith and immediately filed a lien. Certainly the principal of accord and satisfaction and release should be brought to bear in this fact situation, and certainly the trial court so found.

Appellant further cites **Brimwood Homes, Inc. vs Knudsen's Builders Supply Company**, 14 Utah 2d 419, wherein a lien waiver was signed and the majority of the court held that the lien waivers did not release the Defendants rights to future liens for other debts, as this would be without consideration. The Knudsen case is certainly not in point in the present situation as, in that case, at no time during the execution of the waivers did either party know how much material had been delivered nor which lots were involved and there was a very definite question as to which property was being released by the waiver signed and, therefore, certainly a question could be raised to show that the waiver was not binding. The Respondent respectfully refers the court to the dissenting opinion of Justice Henroid.

The invalidating of a lien release by self-serving claims of no consideration can open a flood of law suits and seriously bring into question the ability to pass title to any property on which work has been performed, and lien releases have been received, as the lien releases may be attacked at any time by parol evidence. It is the avoidance of this prob-

lem that has caused some courts to hold that the general rule set forth in the Appellant's brief should be overturned and that even a technical legal consideration could be found to support it. See 112 A.L.R. 1221.

The Appellant received consideration of having cash now, though less in the amount than thought due by him, as a real benefit in view of the fact that he might be put to extra cost, delay or litigation. The trial court held that there was sufficient consideration and that the lien release was valid and worked to relieve Roberts Investment of any and all claim against it by the Appellant and was only given after discussion and understanding by both parties.

ARGUMENT II

THE COURT CORRECTLY CONSTRUED THE RECEIPT AS A RELEASE OF ROBERTS INVESTMENT FROM LIABILITY.

The receipt signed by Appellants Office Manager was correctly construed as operating in favor of Roberts with respect to the American Construction Company debt. Although the receipt runs partially to Valley State Bank, the clear meaning of the receipt, with reference to Roberts, is set forth as follows:

"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 material delivered or labor performed.

The release is unambiguous as seen in the language quoted. All of the testimony relating to the receipt indicates that Appellants Office Manager and General Manager read and understood the language and even questioned the same before signing it. Mr. Frank Roberts at all times stated that he would not pay American Construction debt and that in order to obtain the monies proffered, the release would have to be signed. With this stipulation and understanding, it was signed.

The receipt was not misconstrued by the court as Appellant alleges. The receipt, as are most lien releases, ran to the owner and Valley State Bank and all of the bargaining as well as discussions were had with the owner. Gibbons and Reed apparently felt that they could sign the lien release, get their money, and then immediately file a lien and cloud the title of owner's property. Although the amount quoted as the consideration was the exact amount of Roberts account there was no distinction, added to the receipt by Gibbons and Reed to the effect that this would act as a release for the claim against Roberts only and not against the claim had against American Construction Company.

The Appellant again cites **Tanner vs. Utah Poultry and Farmers Cooperative**, 11 Utah 2d 353, 359 P 2d 18 (1961) as authority for alleging that the receipt prepared by Roberts was ambiguous. However, it should be noted that that case specifically said in one portion of the release that it was to clear all of the obligation owed under the marketing of

the 1951 crop of turkeys, and then went on to say that it was a release against any and all obligations arising between the Plaintiff and Defendant. This type of misunderstanding is not found in the receipt signed in this case and further weight is given to this portion in view of the fact that Appellants Office Manager affixed the pertinent date to the release himself and further added that the release was for concrete delivered.

Appellant alleges that there was no suggestion that Gibbons and Reed should release the obligation for the payment due but only that it should sign the release. The record indicates that there was discussion of both accounts prior to the signing of the release and the Office Manager and General Manager both admitted that they read the release before signing it. There can be no question that they understood the clear meaning of the receipt itself, to say otherwise would be adding to the evidence the unexpressed intent of these individuals. The court again is referred to **Holbrook vs. Webster's Inc.**, 7 Utah 148, wherein the court stated:

"It does not lie in the mouth of Appellant to say that he was mistaken in the legal effect of the release or that he did not intend that it should be given the only legal effect of which it is susceptible."

Clearly this same language applies in this case.

It is difficult to understand the position of the Appellant claiming that the language of the receipt is directed primarily toward protection of Valley

State Bank when, in fact, the receipt clearly states that it protects Valley State Bank and goes even further and releases and satisfies any claim as against the owner and the court certainly did not err in so holding.

ARGUMENT III

APPELLANT IS NOT ENTITLED TO A JUDGMENT IN THE AMOUNT OF ITS CLAIM, INTEREST AND ATTORNEY FEES AS THE COURT FOUND THAT THE AMENDED LIEN WAS IMPROPER AND THE RECEIPT WAS EFFECTIVE AS A RELEASE OF LIABILITY.

Appellants contention that it is entitled to Judgment under 14-2-2 Utah Code Annotated 1953, is erroneous. The court clearly held that the receipt was effective as a release of that or any liability arising out of the transaction now before the court.

The language of 14-2-3 Utah Code Annotated 1953 contains the provision that in an action brought upon the bond provided for the Chapter, the successful party would be entitled to recover a reasonable attorney fee, but there is no provision that attorney fees should lie on an action for failure to obtain a bond and this statute should be strictly construed and no attorney fee should be allowed.

Appellants contention that it is entitled to attorney fees under 38-1-8 Utah Code Annotated 1953 is also erroneous in that the court ruled that the amended lien as filed was improper and being improper, of course, the Appellant cannot prevail

on a foreclosure proceedings nor claim that it's entitled to an attorneys fee.

The lien as originally filed, stated that the first material was furnished on May 7, 1964, this being the period that the first material was delivered directly to Roberts and it further failed to state that the material delivered was at the insistence and request of American Construction Company. It is interesting to note that the lien, as originally filed, covered only material delivered to Roberts and only during that period in which Roberts themselves were ordering the goods and materials. The lien did not cover any period involving American Construction Company. Yet, the Appellant would have us believe that the lien as originally filed was supposed to relate to the period for which they claimed that a lien release had not been given. But, in fact, it covered only that period which by their own statement had been released. Six months later they amended their lien in an effort to correct this gross error. This error was material and certainly not readily explainable and the trial court found that it was clearly improper. The Appellant further contends that this would be an imperfection of the human machinery and that a recovery of a just debt should not be denied when nothing but fair dealing is apparent. It is apparent that there was no fair dealing on the part of Appellant in this matter and that they signed the release giving it to Roberts, knowing that it was to induce others to pay monies to Roberts and then immediately filing a lien on the same property.

It has been held that the primary purpose for the filing of a claim for a mechanics lien is to give notice, to subsequent purchasers and its validity depends on the notice giving quality. See 36 Am Jur 155. In this case from the notice filed, a purchaser would not be placed on notice particularly when shown the release given to Roberts Investment by Gibbons and Reed. The question of time and delivery becomes important because of such designation and the Appellant should not be allowed to amend to now claim a wholly different debt with different parties alleging that it was immaterial or trifling.

The errors in the mechanics lien in this case were not understandable and certainly did prejudice Roberts in that they were wholly different from that set forth in the original lien. The lien should be held to be improper and no Judgment should be awarded to Appellant and certainly no attorneys fees should be allowed in this case.

CONCLUSION

The trial court correctly construed the receipt as releasing Roberts Investment from any liability incurred. Said receipt being clear, unambiguous, signed only after discussion and the court correctly found that there was sufficient consideration for so holding. It is not essential that the consideration be anything other than something of value. Both parties to this law suit had discussed the claim of Gibbons and Reed against American Construction Company and the claim against Roberts and the Appellant

certainly is not justified in claiming it is not bound by the receipt presented to Roberts Investment Company.

The Judgment of the District Court of Salt Lake County should be upheld and Appellants should be ordered to pay the costs incurred by the Respondent.

Respectfully submitted,

THOMAS P. VUYK

VUYK & FORD

53 East Fourth South
Salt Lake City, Utah 84110

Attorney for Respondent