

2000

Jaye Smith Construction Co. v. Board of Education, Granite School District : Brief of Respondent

Utah Supreme Court

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Dwight L. King; Attorney for Respondent.

Fabian & Clendenin; M. Byron Fisher; Ted D. Smith; Attorneys for Appellant.

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UTAH SUPREME COURT

BRIEF

14497R

COURT OF THE

STATE OF UTAH

JAYE SMITH CONSTRUCTION CO.,
Plaintiff-Respondent,
vs.
BOARD OF EDUCATION, GRANITE
SCHOOL DISTRICT,
Defendant-Appellant.

Case No. 14497

BRIEF OF RESPONDENT

Appeal from Amended Judgment of the Third
Judicial District Court of Salt Lake County,
Honorable Stewart M. Hanson, Sr., Judge

DWIGHT L. KING
2121 South State Street
Salt Lake City, Utah 84115

Attorney for Respondent

FABIAN & CLENDENIN
M. Byron Fisher
Ted D. Smith
800 Continental Bank Building
Salt Lake City, Utah 84101

Attorneys for Appellant

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE
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DWIGHT L. KING
2121 South State Street
Salt Lake City, Utah 84115

Attorney for Respondent

FABIAN & CLENDENIN
M. Byron Fisher
Ted D. Smith
800 Continental Bank Building
Salt Lake City, Utah 84101

Attorneys for Appellant

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IN THE SUPREME COURT OF THE
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JAYE SMITH CONSTRUCTION CO.,
Plaintiff-Respondent,

vs.

BOARD OF EDUCATION, GRANITE
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Defendant-Appellant.

Case No. 14497

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This action was brought by plaintiff to recover the actual costs of Weyerhaeuser Blue Star and Red Star decking used by plaintiff in the construction of the Kearns athletic addition and on the gymnasium floor at the Kearns Junior High physical education addition.

DISPOSITION IN LOWER COURT

Judgment was granted by Stewart M. Hanson after trial for the full amount prayed for by plaintiff in his Complaint, plus the additional \$150.00 for the striping which had been performed by plaintiff. Total amount of the judgment was \$5,591.30.

RELIEF SOUGHT ON APPEAL

Granite School District, defendant, seeks to have the judgment of the lower court reversed and judgment entered in favor of itself and against the plaintiff no cause of action.

STATEMENT OF FACTS

Plaintiff will restate the facts that it considers supported by a fair, full and careful examination of the whole record.

Plaintiff's claim arises out of a construction project which he completed for the defendant at the Kearns Junior High School physical education addition. He claims the actual cost of Weyerhaeuser Blue Star and Red Star decking installed which was unavailable at the time of the bid opening, but was required by the plans and specifications.

The following facts are undisputed:

(a) The proposal form, plaintiff's bid, Exhibit 10-P, dated March 6, 1973 had enclosed with it the letter of March 6, 1973, Exhibit 11-P, which advised the School Board of the problem relating to the Weyerhaeuser decking;

(b) The facts stated in the letter of March 6, 1973 relating to the decking were true. The material was not available, was not being manufactured, and no accurate determination of price could be made for the material at the time of the bid opening;

(c) The plans, specifications, all documents and addenda entitled "Physical Education Addition, Kearns Junior High School",

were made a part of the proposal form by reference and were the basis of the proposal form and the ultimate agreement, Exhibit 12-P;

(d) The plans and specifications required the use of Weyerhaeuser Blue Star and Weyerhaeuser Red Star heavy decking and that material was actually installed by plaintiff;

(e) Plaintiff advised the School District, by and through its designated agent Arthur K. Olsen, the architect, on May 23, 1973, that the decking had been obtained and that the price was higher than quoted and restated the original term of the letter of March 6, 1973, Exhibit 11-P (See Exhibit 15-P).

(f) Defendant permitted plaintiff to proceed with the installation of the Weyerhaeuser Blue Star and Weyerhaeuser Red Star heavy decking without objection, knowing of the increased expense, and accepted plaintiff's work;

(g) Plaintiff made its claim promptly for the additional cost (Exhibit 15-P). It became a matter of discussion between the architect and the School District officials during the construction period (See Inter-School District correspondence, Exhibits 16-P and 7-D);

(h) The material specified actually cost what plaintiff paid and his charges were reasonable;

(i) Change order No. 3, Exhibit 20-P, was actually approved by the architect Arthur K. Olsen, who is designated in the agreement as the agent for the defendant with whom the contractor must resolve his differences;

(j) The painting addition for basketball lines on the

gymnasium floor, amounting to \$150.00, was also the subject of a change order approved by the architect and submitted to the defendant. A copy of said claim was a part of the plaintiff's Answers to Interrogatories filed with the court and mailed to defendant's attorney on the 18th of November, 1974;

(k) Defendant has refused to pay either of the items that the plaintiff claims are due.

There is a dispute in the testimony and a direct contradiction as to whether or not the inability of the contractors to obtain a supply or a quote as to price for the Weyerhaeuser decking at the time of the bid opening was called to the School Board's attention. Plaintiff's testimony is clear to the effect that such problem was called to the Board's attention. Board witnesses do not recall such an event and the minutes of meeting at which the bids were opened do not reflect a reference to the letter, Exhibit P-11, which was with plaintiff's bid proposal.

The amount of the proposal form was placed in defendant's form contract which became Exhibit 12-P. The agreement provides that Arthur K. Olsen, the architect, is the person authorized by defendant to supervise the construction. The contract provides that if the architect provides additional drawings and specifications, the contractor shall perform, execute and complete the work in accordance with such additional drawings (Pg A-2, Exhibit 12-P).

Paragraph 2 of 12-P provides that the contractor will follow generally the directions of the architect and that the architect's interpretation of the drawings and specifications

shall be conclusive on the parties to the agreement. The third paragraph provides again that the architect's direction shall govern the contractor's decisions in choosing material. The fourth paragraph provides that the contractor shall not deviate from the drawings or specifications or execute any extra work of any kind unless authorized in writing by the architect. The amount to be paid, allowed or deducted on account of any such alterations or extra work, if any, shall be stated in writing or provisions made for the determination thereof in said written authorization. The eleventh paragraph of the agreement provides that there will be paid the basic sum of \$164,022.00 subject to additions and deductions as herein provided and subject to the provisions of the agreement. The fifteenth paragraph of the agreement provides that the architect's decision as to the true meaning of the plans and specifications, performance of work or completion of jobs, shall be final and conclusive upon the parties.

The obtaining of prior written approval was a procedure the evidence shows was not followed. (See correspondence, Exhibits 15-P, 7-D, 16-P). It is a common practice in the construction business to do the work and then do the documentation (Pg 46 of Tr.).

Plaintiff obtained change orders approved by the architect on both of the extras for which he seeks payment.

When plaintiff requested a change order approval, he then ran into the difficulty which gives rise to the present action. Apparently the matter came somewhat to a head immediately in a letter dated June 26, 1973 from the architect to the District

Supervisor. In the letter the architect states:

"It appears that he needs to have his contract increased due to the bid price he used and the price he ultimately had to pay after he finally obtained the decking."
(Exhibit 16-P)

Defendant still refused to pay for the decking. An additional letter was written by the architect to the Supervisor relating to Mr. Smith's requested changes. It is Exhibit 8-D dated January 8, 1974 and refers to change order No. 2 and approves the painting of the additional lines on the floor which Mr. Smith sought payment for in the amount of \$150.00, advises that the wood decking was still not resolved and that a meeting would have to be held to discuss it (Exhibit 8-D).

The discussions occurred but nothing was resolved, and it became necessary for the plaintiff to bring the action from which this appeal arises.

After trial the court made Findings of Fact and Conclusions of Law and a Judgment which was subsequently amended and became the final judgment of the court. The court found the disputed question of fact in plaintiff's favor and in Finding No. 4 found that the letter written by plaintiff was noticed by agents of the defendant or should have been, in the exercise of reasonable care, noticed in the examination of the bids. Court further found that the qualification letter was a part of the plaintiff's bid and became a part of the contract executed by the parties on the 12th of March, 1973. Court found that the defendant had received the benefit of the decking and that equity required it to pay the

reasonable cost and value of the materials. In paragraph 6 of the Findings, he further found that it would be inequitable and constitute unjust enrichment for the defendant to require plaintiff to furnish and bear the cost of the redwood decking without compensation. Court also found that the \$150.00 for painting the basketball floor was due. The Amended Judgment granting plaintiff judgment for the sum of \$5,591.30 adjusted the period for which interest was allowed plaintiff on the balance owing as found by the court.

ARGUMENT

POINT I

ALL DOCUMENTS WHICH SHED LIGHT ON MEANING OF A CONTRACT MAY BE CONSIDERED IN INTERPRETATION.

The thrust of defendant's argument under Point I of its brief is that the trial court could not receive in evidence and consider Exhibit 11-P, plaintiff's note attached to the proposal form. The note accurately set forth a state of facts that related to one of the items included in the proposal. It is undisputed that the statements in the exhibit were true. At the time of the bid opening, prices on this particular item could not be obtained and a base price was included for the purpose of calculating the bid.

Based on the proposal form, a contract was prepared (Exhibit 12-P). It refers to the plans and specifications for the building, a document completely outside of the contract. Fortunately, there is no argument about the plans and specifications.

They include the requirement that the Red Star decking and the Blue Star decking manufactured by Weyerhaeuser be used, and this is the item referred to in Exhibit 11-P.

Williston on Contracts, Third Edition, §628, Pg. 904, Vol. 4, recites the general rule that documents referred to in an integrated agreement become a part of the agreement as far as they are incorporated by reference. This is true even when the items such as specifications and plans for construction are not attached to the written agreement. Then the Section recites as the law the following:

"Even where a writing does not refer to another writing, if such other writing was made as part of the same transaction, the two should be interpreted together."
Pg. 904.

Plaintiff submits that it is obvious that the proposal form, the letter attached, the contract, the plans and specifications, are all documents that should be referred to by the court and interpreted together in arriving at the state of the facts on which the parties contracted at the time of the contract.

Defendant cites for the court's consideration Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266, 28 Utah 2d 261. Plaintiff submits that this decision supports the basic principles that uphold the trial court's decision. In Bullfrog Marina, Inc., the trial court had held that an employment agreement and a lease that had been executed by the parties were related and that both of the documents had to be interpreted together, even though neither referred to the other, and set down the principle of law that

plaintiff believes is applicable, Utah 267:

"The trial court did not err in following the rule of law that where two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together so far as determining the respective rights and interests of the parties, although they do not in terms refer to each other."

An additional important decision that recites correctly the law where there are more than one writing executed contemporaneously with the contract or relating to the execution of the contract is Continental Bank & Trust Co. v. Bybee, 306 P.2d 773, 6 Utah 2d 98. The court there held that where the intentions of the parties are to be ascertained, the document itself is first considered, then contemporaneous writings concerning the same subject matter are considered, and third, extrinsic parol evidence of intentions may be considered.

Plaintiff's position is that the exhibit relating to the Weyerhaeuser decking is not an attempt to vary the terms of a written instrument, but simply shows the state of facts at the time the proposal form was executed. Defendant prepared the plans and specifications requiring Weyerhaeuser decking and should be charged with knowledge of its unavailability and price uncertainty. Certainly if plaintiff, after commencing the construction, had been unable to obtain Weyerhaeuser decking and requested a right to substitute, Exhibit 11-P would have been something the parties would consider. If substitution had been permitted and a higher price material than those estimated in the bid were required, no one would argue, it is submitted, that plaintiff would not be

entitled to the additional allowance. Or, by the same token, if substitution were permitted and cheaper materials than the amount set forth in the bid were obtained, it is obvious that a reduction in the contract payment would be made.

An even more recent case decided by the court indicating the application of basic rules for the interpretation of contracts to municipal corporations and other public organizations is Midwest Realty v. City of West Jordan, Case No. 13874, decided on October 29, 1975. There bid forms were used and minutes of council meetings examined to determine the agreement between the parties and the City was required to pay for the reasonable value of the advantages and improvements it received.

When all of the documents are examined under which plaintiff constructed the Kearns Junior High facility, plaintiff submits that there is adequate provision for the interpretation placed on the agreement by the trial court.

The agreement provides for adjustments as the construction project proceeds. The adjustments to be made by consultation and through the architect who is designated as the defendant's representative. The modifications may increase or decrease the contract price. If work is deleted, costs are decreased. If added, increased.

The Weyerhaeuser Blue Star and Red Star decking were items which the contractor foresaw would become problems in the construction. The material was not being manufactured and a supply was not available, so price would be uncertain. Should plaintiff now be penalized for its efforts to be fair and equitable

in performing the contract undertaken for the School Board.

The architect, the designated agent of the Board, agreed that the contractor is entitled to an increase in the price, and under the facts presented the court agreed.

It is submitted the results reached are well within the terms of the written instruments which the court considered properly.

POINT II

CHANGE ORDERS APPROVED BY ARCHITECT MAY BE BASIS FOR COURT'S DETERMINATION OF EQUITABLE SETTLEMENT.

Defendant, in its second point, argues that the change orders that were executed by architect Olsen, acting as agent for the Board, are not binding upon the Board. It is true that no final approval of said change orders was ever obtained by plaintiff. Had he been able to obtain the approval and get paid, then this matter would not be here for the court's consideration. The refusal to approve was arbitrary, unreasonable, and a violation of the agreement.

Consider first change order No. 2 for the striping of the basketball courts. There is no dispute about this being an extra activity required by the contractor. There is no dispute about the reasonableness of the charge of \$150.00. There is no dispute about the fact that it was done at the request of the District and was not included in plaintiff's contract. Yet the change order was not approved after it had been submitted by the architect and by plaintiff. No objection was made by the District as the agreement required. At the time of the trial, witness Davidson, who was the representative of the District during the construction

period, testified concerning the \$150.00 item:

"As an extra expense, I feel that the contractor be paid for it, should at this time." (Pg. 68, Tr. of T.)

Plaintiff might be willing to concede that the executed change orders requested by him were not binding upon the District until approved by someone above the level of the architect. But certainly approval could not be withheld arbitrarily. In the light of all the evidence, the payments are in fairness and equity due to the contractor.

In a very recent decision, this court, in considering construction contracts and their interpretation, set forth the rule which, plaintiff submits, is applicable here. In Zion's Property, Inc. v. Holt, 538 P.2d 1319, Pg. 1321, the court stated:

"We accept the correctness of plaintiff's argument that there is implied in any contract a covenant of good faith and cooperation, which should prevent either party from impeding the other's performance of his obligations thereunder;"

The court's findings do not require a finding that the District was bound by the architect's approval of the change orders. On the basis of the equitable principles cited, the District should pay the charge for decking specified. Unjust enrichment would occur if it were not required to pay.

Both of the witnesses for defendant, that is Davidson and Hilton, testified that many adjustments are necessary in the construction of large projects, and the adjustments that are made are those which the District and the contractor, in negotiation, consider to be fair under all the circumstances. Their testimony

establishes the principle requiring fair play and good faith in the adjusting claims. (See Davidson, Pg. 64 of Tr. of T.; Hilton, Pg. 80 of Tr. of T.)

The law recognizes that in every contract there is an implied covenant of good faith and fair dealing. (17 C.J.S., §328, Pg. 285-86)

A contract conferring on one party discretionary power which affects the other party's rights imposes a duty to exercise such discretion in good faith and in accordance with fair dealing. California Lettuce Growers v. Union Sugar Co., 45 C.2d 474, 289 P.2d 785.

This court in State Automobile & Casualty Underwriters v. Salisbury, 27 Utah 2d 229, 494 P.2d 529, set forth the contractual obligation to be implied in the following language:

"But also to be considered in connection therewith are the mutual responsibilities the parties have to each other which are implied from the operation of law applicable to such relationship. Arising from what is commonly known and accepted as to the customs and experience in the everyday affairs of life, the parties each has the right to assume that the other will perform the duties he agrees to with reasonable care, competence, diligence and good faith, even though such terms are not expressly spelled out in the contract; and if failure to so perform those duties results in damage to the other party he is entitled to recover for breach of the contractual duties."

No evidence was presented which indicated that the adjustments requested by plaintiff were not fair, equitable and reasonable. The court found in accordance with the claim of plaintiff that the items should be paid him in settlement of his contract with the District, and that to refuse payment would be an unjust enrichment

to the District, permitting it to take his materials without just compensation.

POINT III

AMENDMENT TO INCLUDE STRIPING CHANGE WAS PROPERLY GRANTED.

Defendant claims unfair surprise in the court's permitting the amendment to be made to the Complaint. It related to the \$150.00 item for striping of the basketball floor. It was not included in the original Complaint because plaintiff believed it to be an item that the District never intended to dispute. An item which it thought the District would pay without being a part of the litigation.

As early as January 8, 1974, the painting of additional lines on the wood floor was approved by the architect when the matter was discussed in April, 1974, and change orders were prepared and submitted. Change order No. 2 covering the striping was not a matter to be contested. (See Exhibit 22-P for the reference to this item).

In addition to the references made in the exhibits referred to, in Answers to Interrogatories during the discovery period, Answer No. 4 on Pg. 12 of the Record on Appeal states the following:

"Attached to these Answers and by this reference made a part hereof, are the two change orders which have been approved by the architect and forwarded to the School Board. Neither of the change orders has been paid. It is plaintiff's position that the modification on contract price is provided for in the contract and the change orders, once approved by the agent for the School Board, namely the architect, the School Board is then bound by said approved change and must pay the additional price as part of the contract."

The exhibits were the change orders now in this litigation.

Rule 15 of the U.R.C.P. provides that where issues are not raised by the pleadings, amendments may be made as may be necessary to cause them to conform to the evidence and to raise the issues upon motion of any party at any time, even after judgment, and provides that the court may allow the pleadings to be amended when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

This court, in a carefully stated interpretation of Rule 15(b), U.R.C.P., set down the principles, plaintiff believes, which require approval of the trial court's order permitting amendment. See Cheney v. Rucker, 14 Utah 2d 205, 381 P.2d 86, at pg. 211:

"They must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required. Our rules provide for liberality to allow examination into and settlement of all issues bearing upon the controversy, but safeguard the rights of the other party to have a reasonable time to meet a new issue if he so requests. Rule 15(b), U.R.C.P., so states. It further allows for an amendment to conform to the proof after trial or even after judgment, and indicates that if the ends of justice so require, 'failure so to amend does not affect the result of the trial of these issues.' This idea is confirmed by Rule 54(c) (1), U.R.C.P.: '(E)very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.'"

See also Seamons v. Andersen, 122 Utah 497, 252 P.2d 209; Morris v. Russell, 120 Utah 545, 236 P.2d 451.

In the light of the fact that the \$150.00 item had been a matter repeatedly discussed during the time that this case was being brought to issue and to trial and was an item that the plaintiff had been assured there was no serious controversy about, plaintiff submits that the claim that defendant was surprised or prejudiced in any way by having this matter determined and submitted to the trial court and included in the ultimate judgment against the District seems to be without merit.

CONCLUSION

Plaintiff respectfully submits that the judgment of the trial court should be affirmed, that costs be allowed to the plaintiff.

Respectfully submitted,

DWIGHT L. KING
2121 South State Street
Salt Lake City, Utah 84115

Attorney for Respondent