

1979

L. Keith Lignell et al v. Clifford M. Berg et al : Additional Pages 13-18

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

E. KEITH LIGNELL, MARIAN H. *
LIGNELL, his wife, BURTON M. *
TODD and PHYLLIS W. TODD, *
his wife, *

Plaintiffs and *
Appellants, *

v. *

CLIFFORD M. BERG and WILLIAM *
R. BERG, a partnership, dba *
BERG BROTHERS CONSTRUCTION *
COMPANY, and FIDELITY AND *
DEPOSIT COMPANY OF MARYLAND, *
a corporation, *

Defendants and *
Respondents. *

FILED

FEB 22 1979

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Clerk, Supreme Court, Utah

Case No. 15001

ADDITIONAL PAGES 13-18

Plaintiffs are aware of no provision of the Utah Rules of Civil Procedure that would permit Defendants-Respondents to file a written supplement to either their oral argument or their brief after the day of argument.¹ If, however, the Court is inclined to consider Defendants' "additional pages" Plaintiffs submit the following to correct the erroneous conclusions contained therein.

Apparently Defendants, and possibly the Court, misconstrued the thrust of Plaintiffs' argument relating to attorney's

¹Rule 75(p)(3), U.R.C.P., authorizes corrections, but not supplements.

fees. In this regard it is essential that the distinction between attorney's fees awarded as costs (§14-2-3) and attorney's fees awarded as damages be kept in mind. Plaintiffs readily concede that both Defendants pleaded an entitlement to attorney's fees ("costs") under §14-2-3. (Plaintiffs attached copies of Defendants' counterclaims as an appendix to their Supplemental Brief.) Plaintiffs contend, however, that §14-2-3 does not authorize an award of attorney's fees on a Performance Bond and thus Defendants would not be entitled to any award of attorney's fees, either below or on appeal, based upon that statute. Further, Berg Brothers Construction (the partnership) was not, as Defendants claim, the principal on that bond. The principal was Berg Construction Company (the joint venture).

Plaintiffs' second argument relates to Defendants' claim that they are entitled to pass over to the Plaintiffs those attorney's fees awarded to the subcontractors. As Plaintiffs understand Defendants' contention they are seeking this pass through not as costs under §14-2-3 but as damages for breach of contract.

At oral argument Plaintiffs contended that the action of the trial court awarding over the subcontractors' attorney's fees was improper since Defendants failed to plead attorney's fees as an element of their damages and provided no proof of this matter (as damages) at trial; further, the Court² made none of

²Defendants erroneously contend in their "additional pages" that plaintiffs asserted there were "no . . . findings by Defendants-Respondents."

the necessary findings that would sustain such an award as damages (see Plaintiffs' Supplemental Brief), and, in any event, that it was the duty and province of the jury to award defendants their damages for the contract breach and it made no award of attorney's fees.

Defendants' argument that they pleaded an entitlement to attorney's fees does not solve the rest of the deficiencies relating to the award over; nevertheless, it has the potential of creating a gross misunderstanding with this Court.

Even in its supplement, Surety does not contend that it made any claim for attorney's fees other than on the Performance Bond under §14-2-3. Berg Brothers Construction (the partnership) claims, however, that it did make such claims. A review of the record indicates that the purported "cross-claim" against the owners relating to the Comstock-Murray Electric action was never served on plaintiffs or their counsel; rather, it was mailed to Ron Spratling, attorney for Murray-Comstock (R. D31); thus, clearly there was no properly pleaded claim over that would sustain the pass through of the \$21,000 in attorney's fees awarded the electricians, even if the other shortcomings did not exist.

With relation to the drywallers' claim Berg apparently did file a claim over. Plaintiffs moved to dismiss that claim prior to trial (R. C780-781). That matter was argued July 16, 1976, and is reported in pages 25-36 of the Supplemental Transcript (blue backing). Plaintiffs there argued that any kind of

a pass through to them was improper because a bond had been posted which met the requirements of §14-2-2. Defendants stated that the cross-claim was intended to deal only with the matter of extras under the construction contract and was simply filed so that any extras proved by the subcontractors against Berg would be considered in the overall accounting in the contract action between the owners and the contractor. In this regard Mr. Nebeker stated:

Mr. Nebeker: "But the cross-claim is simply to say that the determination on how much drywall he is entitled to and how much the electrician is entitled to goes into the overall accounting . . ." (Supp T.32)

Thereafter the following dialogue took place:

The Court: As I understand your response, Mr. Nebeker, it isn't really you don't take issue with what Mr. Tanner has said . . . "

Mr. Nebeker: "Sure . . ." (Supp T.33)

Based upon this representation by Defendants³ the trial court denied Plaintiffs' motion as follows:

The Court: Anything further on that motion, gentlemen? The Court is going to deny that motion with the explanation given of course that what their intention is and the Court I think understands it's merely what they want to do and I'll limit it to that at the time of trial.

Mr. Tanner: As I understand the Court's ruling, it is based upon the proposition that no such claim as I was talking about is in fact being made therefor?

³Mr. Beesley concurred in the representations of Mr. Nebeker (Supp T.34-35).

The Court: Right. They don't from their explanation given me, they don't claim any other than that entitled to under the contract.

Mr. Tanner: Thank you. Just want to make that clear.
(Supp T.36)

The record shows that Defendants did not intend to pass through attorney's fees awarded to the subcontractors. If they at one time so intended that position was clearly abandoned at the pre-trial.

Defendants' contention that evidence regarding attorney's fees was not presented to the jury is true. This was because Defendants were not pressing any claim to fees other than as costs under §14-2-3. Judge Hall's finding number 11 makes this absolutely clear. The only claim for attorney's fees advanced at trial by Defendants or the subcontractors was under §14-2-3 which does not contain any provision that would authorize a pass through.

In reviewing the record in preparation of this response one additional fact of interest was discovered.

On August 15, 1975, Comstock and Murray Electric filed an Amended Verified Complaint wherein they alleged in Paragraphs 2-5 that a joint venture existed between Clifford M. Berg, William R. Berg and Frank C. Berg and that the joint venture was the general contractor on the Incline Terrace Project. In response thereto Surety, by answer of December 23, 1975, admitted the allegations contained in Murray-Comstock's Paragraphs 2-5 and only took exception to the stated contract amount (R. C335);

therefore, Surety's contention at trial and on appeal that there was no joint venture should be precluded by its previous admission that the joint venture did in fact exist.

Respectfully submitted,

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