

1979

L. Keith Lignell et al v. Clifford M. Berg et al : Additional Pages 9 and 10

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

E. KEITH LIGNELL et al.,

Plaintiffs and
Appellants,

vs.

CLIFFORD M. BERG . . . and
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, a corporation,

Defendants and
Respondents.

Case No. 15001

FILED

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Clark, Supreme Court, Utah

ADDITIONAL PAGES 9 and 10

At the time of supplemental oral argument before the Court on February 20, 1979, counsel for Appellants made the assertion that there were no pleadings or findings by Defendants-Respondents to sustain the judgment for attorneys' fees. An examination of the record will not sustain this allegation. First, in the action brought by plaintiff Copinga/Greenwood, Berg cross-claimed (R.249) against the owners to recover all amounts adjudged in favor of Copinga and Greenwood in the following language:

1. That plaintiffs Hendrik Copinga and Brent Greenwood d/b/a Western Drywall, a partnership and third-party plaintiff Claron Bailey have claimed herein against defendants and cross-plaintiffs Clifford M. Berg and William Berg d/b/a Berg Brothers Construction Company, a partnership in the sum of \$56,786.43 and \$42,786.43, respectively, together with attorney's fees for a contract balance allegedly due and owing plaintiffs and third-party plaintiff as a result of construction of the Incline Terrace

Apartment owned by cross-defendants E. Keith Lignell and Burton M. Todd. . .

* * *

3. That all of the alleged claims against the defendants and cross-plaintiffs Clifford M. Berg and William Berg d/b/a Berg Brothers Construction Company by plaintiffs Hendrik Copinga and Brent Greenwood d/b/a Western Drywall, a partnership and third-party plaintiff Claron Bailey are the liability of cross-defendants E. Keith Lignell and Burton M. Todd as owners under said construction project; that these cross-plaintiffs are entitled to judgment against cross-defendants for any amounts adjudged to be due and owing herein by these defendants and cross-plaintiffs Clifford M. Berg and William Berg d/b/a/ Berg Brothers Construction Company to plaintiffs Hendrik Copinga and Brent Greenwood d/b/a Western Drywall or third-party plaintiff Claron Bailey.

In the action brought by subcontractor Comstock-Murray Electric, Berg also cross-claimed against the owners to recover all amounts adjudged in favor of the electrical subcontractor (R.29). Each of these actions included specific allegations for recovery of attorneys' fees.

Second, Berg (R.827) and Surety (R.825) both pleaded by counterclaim against the owners (to the Amended Complaint brought by the owners on the Performance Bond) to recover attorneys' fees pursuant to the bonding statute, 14-2-3, U.C.A. The language of the Berg Counterclaim is as follows:

COUNTERCLAIM

Defendants Clifford M. Berg and William R. Berg, d/b/a Berg Brothers Construction Company complain of the plaintiffs E. Keith Lignell and Marian H. Lignell, his wife, and Burton M. Todd and Phyllis W. Todd, his wife, and allege as follows:

1. Defendants incorporate herein their answers to
S.J. Quinney Law Library. Funding for digitization provided by the Institute of Research and Library
paragraphs 12 and 13 of plaintiffs Third Cause of Action
Digital Access and Technology Act, administered by the Utah State Library.

2. Defendants Clifford M. Berg and William R. Berg d/b/a Berg Brothers Construction Company as principals on the performance and payment bond furnished the same pursuant to Chapter 2 of Title 14, Utah Code Annotated, 1953. The statute provides as follows:

"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."
(14-2-3)

3. Plaintiffs at the present time owe the subcontractors Coppinga and Greenwood and Comstock Electric and Murray Electric a sum of money for the work performed by said subcontractors on the Incline Terrace Apartments, and plaintiffs further owe Berg Brothers Construction Company a sum of money for the work performed by the general contractors as alleged in prior Complaints, Cross-claims and Counterclaims filed herein.

4. Pursuant to the provisions of 14-2-3, these defendants are entitled to recover a reasonable attorney's fee to be fixed by the court which defendants allege to be the sum of \$35,000.00 for attorney's fees and expenses. (R.827 at 831)

The allegations in the Surety's Counterclaims against the owners are practically identical to the foregoing allegations of Berg's Counterclaim (R.825).

Third, the Findings of Fact and Conclusions of Law are reproduced in full at pages 3 to 8 of the Brief of Defendants-Respondents. Findings, numbers 4 through 14, inclusive, clearly establish the award of attorney's fees. The evidence concerning, and the matter of attorney's fees (by stipulation of all counsel), was not submitted to the jury. The statute (14-2-3 U.C.A.) provides that attorneys' fees shall " . . . be fixed by the Court, which shall be taxed as costs in the action" (Emphasis added). The trial court very carefully followed the statute.

Citation to the pleadings was not formerly furnished in the Brief of Defendants-Respondents because Appellants' points on appeal did not raise any issue as to lack of pleadings to sustain an award of attorneys' fees.

Respectfully submitted,

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Richard H. Nebeker