

1996

Western Rock Products Corporation, a
Pennsylvania Corporation v. Tri-County
Confinement Systems, Inc. a Pennsylvania
corporation : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Western Rock v. Tri-County*, No. 960838 (Utah Court of Appeals, 1996).
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IN THE UTAH COURT OF APPEALS

WESTERN ROCK PRODUCTS
CORPORATION, a Pennsylvania
Corporation,

Plaintiff/Appellee,

vs.

TRI-COUNTY CONFINEMENT
SYSTEMS, INC., a Pennsylvania
corporation,

Defendant/Appellant.

960838-CA
Appeal No. 960290-CA

Priority No. **15**

BRIEF OF APPELLEE

AN APPEAL FROM THE DECISION OF THE
FIFTH JUDICIAL DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH
THE HONORABLE J. PHILIP EVES

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FILED

Utah Court of Appeals

JUL 17 1997

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JURISDICTION OF THE UTAH COURT OF APPEALS

The provisions of Utah Code Annotated § 78-2A-3(2)(j) (1996) confer jurisdiction on the Utah Court of Appeals, inasmuch as this is a case transferred to the Court of Appeals from the Utah Supreme Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The sole issue in this case is whether the trial court erred in concluding Western Rock Products, Inc. (hereinafter "Western Rock") and Tri-County Confinement Systems, Inc. (hereinafter "Tri-County") entered a settlement agreement. This issue was preserved in the trial court. (R. at 18, Summary Judgment ¶¶ 8-12; R. at 58, Memorandum in Opposition ¶8; R. at 136, Summary Judgment together with underlying Findings of Fact and Conclusions of Law, ¶10.) Although a trial court's summary enforcement of a settlement agreement is not reversed on appeal unless it is shown that there was an abuse of discretion, the issue as to whether a contract exists between the parties is a question of law which is reviewed for correctness. See John Deere Co. v. A & H Equipment, Inc., 876 P.2d 880, 883 (Utah App. 1994).

Tri-County sets forth eleven separate issues as determinative issues. Only its first issue, as to whether the trial court correctly determined the parties reached an agreement, is material.

DETERMINATIVE AUTHORITY

No constitutional provisions, statutes, ordinances, rules, or regulations are determinative of the issues raised in this Appeal.

STATEMENT OF CASE

Tri-County was a general contractor on a large industrial project (hereinafter "Circle Four Project") owned by Circle Four Realty, a dba of Carroll's Foods of Utah, Inc., West Isle Partners, Inc., Prestage Farms of Utah, Inc., and Smithfield of Utah, Inc., (hereinafter "Circle Four"). Precise Concrete, Inc. (hereinafter "Precise") was a subcontractor on the Circle Four Project. Western Rock was hired by Precise to perform certain tasks and supply certain material on the Circle Four Project. Precise failed to pay Western Rock. Therefore, Western Rock threatened to file a mechanic's lien on the Circle Four Project. The owner, Circle Four, informed Tri-County, the contractor, that a mechanic's lien must not be filed on the project because of a pending financial transaction involving the Circle Four Project. Although not the owner of the project, Tri-County desperately wanted to avoid the filing of a mechanic's lien. In order to avoid the filing of a mechanic's lien, Tri-County entered an agreement with Western Rock. The terms of the agreement were first agreed to orally, then set forth in Tri-County's November 7, 1995 memo, and subsequently acknowledged by all parties in the execution of escrow instructions on November 8, 1995.

Pursuant to the contract between Western Rock and Tri-County, each party was to perform certain conditions. Tri-County was to escrow \$185,317.26. This escrowed amount (without interest) was to be paid to Western Rock if Western Rock complied with certain conditions. First, Western Rock was to forebear filing a mechanic's lien on the Circle Four Project. Additionally, as a condition to the contract, Western Rock was to use its best efforts to collect money owed it by Precise. The preceding conditions were orally agreed to by both parties and subsequently

confirmed in Tri-County's November 7, 1995 memo and escrow instructions dated November 8, 1995. Based on the contract, Tri-County placed \$185,317.26 in escrow. In turn, Western Rock did not file a mechanic's lien and, within two weeks after the funds were deposited, filed a lawsuit against Precise to collect money owed by Precise.

Despite the oral and written agreement and performance based on the agreement, Tri-County asserted there was no binding contract because a more formal agreement was contemplated by the parties. Western Rock filed a complaint on January 31, 1996, asserting three causes of action against Tri-County. The three causes of action were:

1. Anticipatory breach of contract;
2. Breach of contract; and
3. Declaratory relief.

All three causes of action arose from Tri-County's attempt to disavow the parties' settlement agreement.

Judge J. Philip Eves in the Fifth District in and for Beaver County granted Western Rock's Motion for Summary Judgment. Judge Eves concluded that as a matter of law, there was a valid contract between Tri-County and Western Rock and that Western Rock was entitled to receive the escrowed funds pursuant to such contract.

STATEMENT OF FACTS

1. Western Rock supplied building materials to Precise, a subcontractor who was working on a large construction project owned by Circle Four. (R. at 131, Summary Judgment, at 2; See also Tri-County's Appellate Brief, at 7. ¶¶ 1-2.)

2. Tri-County was the general contractor on the Circle Four Project. (R. at 131, Summary Judgment, at 2; See also Tri-County's Appellate Brief, at 7, ¶¶ 1-2.)

3. Western Rock notified both Circle Four and Tri-County that it had not been paid the balance owed by Precise and that it intended to file a mechanic's lien on the Circle Four Project. (R. at 131, Summary Judgment, at 2; See also Tri-County's Appellate Brief, at 7, ¶¶ 3-4.)

4. Circle Four and Tri-County then informed Western Rock that there was a large financial transaction pending. Both Tri-County and Circle Four told Western Rock they wished to avoid the filing of a mechanic's lien at that time as it might upset the financial arrangements. (R. at 131, Summary Judgment, at 2; See also Tri-County's Appellate Brief, at 7, ¶ 4.)

5. Western Rock and Tri-County entered into discussions as to how the matter should be handled. (R. at 131, Summary Judgment, at 2; See also Tri-County's Appellate Brief, at 7-8, ¶¶ 4-6.)

6. As a result of these discussions, on November 7, 1995, Terry L. Weaver, President of Tri-County, issued a memorandum addressed to Wayne Smith, Operations Manager for the Cedar City area for Western Rock confirming the parties' understanding (hereinafter "Confirmation Memo"). (R. at 96 and 131, Summary Judgment, at 2; See also Tri-County's Appellate Brief, at 8, ¶ 6.) (A copy of the memorandum is attached hereto, labeled Exhibit A, and incorporated herein by this reference.)

7. The Confirmation Memo drafted by Tri-County contained "escrow conditions," "escrow release conditions," and "general understanding" provisions as follows:

a. ESCROW CONDITIONS.

1. Tri-County agrees to escrow \$185,317.26 in an interest-bearing account with Western Rock's legal counsel.
2. Upon receipt of the escrow funds, Western Rock agrees to supply lien waivers.

b. ESCROW RELEASE CONDITIONS.

1. Western Rock shall use its best effort to collect money owed and resolve differences with Precise. If this cannot be accomplished in a six month period, Western Rock has the right to draw on escrow for principal amount without interest.
2. Tri-County receives interest on escrow funds.

c. GENERAL UNDERSTANDING

1. Western Rock agrees to provide internal documents to Tri-County regarding Precise's account in order to assist in concluding matters.
2. Western [Rock] will draw up escrow document and forward to Tri-County.

See R. at 96, Tri-County Confirmation Memo to Western Rock (Exhibit "A").

8. On November 8, 1995, Western Rock's president and Tri-County's chief financial officer signed and caused to be delivered and accepted by Southern Utah Title Company, a document containing "Escrow Instructions for Settlement Transaction between Western Rock Products Corporation and Tri-County Confinement Systems, Inc." (hereinafter "Escrow Agreement"). (R. at 126-128, a copy of the Escrow Agreement is attached hereto, labeled Exhibit B, and incorporated herein by reference.) Southern Utah Title was requested to act as escrow agent, to which it agreed, and was given the signed instructions pertaining to the handling of the account. (R. at 131, Summary Judgment, at 2; See also Tri-County's Appellate Brief, at 10, ¶ 11.)

9. On November 8, 1995, as provided in the Confirmation Memo and Escrow Agreement, Tri-County escrowed \$185,317.26 with Southern Utah Title. (R. at 131-32, Summary Judgment, at 2-3; See also Tri-County's Appellate Brief, at 10, ¶ 11.)

10. Although not involved in the correspondence of November 7, 1995, regarding the agreement between Western Rock and Tri-County, Ronald Solt, Tri-County's Chief Financial Officer, referenced the "original agreement" entered into orally on November 7, 1995, and set forth in the Confirmation Memo and Escrow Agreement, in his November 8, 1995, letter (hereinafter "Solt's Letter"). (R. at 82, Solt's Letter). (A copy of Solt's Letter is attached hereto, labeled Exhibit C, and incorporated herein by reference.)

11. The purpose of the escrow account was to induce Western Rock to forebear on filing a mechanic's lien against the Circle Four Project during the critical period of the pending financial transaction. (R. at 132, Summary Judgment, at 3; See also Tri-County's Appellate Brief, at 10-11, ¶¶ 11-12.)

12. Western Rock did not file its mechanic's lien in conformity with the provisions of the Confirmation Memo and Escrow Agreement. (R. at 132, Summary Judgment, at 3; See also Western Rock's Reply, at 2, ¶ 5, (R. 98)).

13. Western Rock instituted formal collection proceedings against Precise (hereinafter "Precise Complaint"). (R. at 52-54, Precise Complaint.) (A copy of the Precise Complaint is attached hereto, labeled Exhibit D, and incorporated herein by reference.)

14. Additionally, Western Rock's attorney drafted, and tried to have Tri-County sign, an additional formal agreement setting forth in greater

detail the operative terms of settlement, as established in Western Rock and Tri-County's oral agreement. Tri-County's Confirmation Memo and the Escrow Agreement. However, the parties never finalized the formal written agreement with its more detailed terms (hereinafter "Formalized Agreement"). (R. at 132, Summary Judgment, at 3; See also Tri-County's Appellate Brief, at 11, ¶ 13.)

SUMMARY OF ARGUMENT

I. A binding contract exists when there is mutual assent by the parties manifesting their intent to be bound. In the present case, Tri-County's signed Confirmation Memo and the Escrow Agreement signed by all parties manifested the parties mutual assent. In addition to the signed documents, the parties mutual assent is evidenced by their conduct. Tri-County and Western Rock both performed pursuant to the terms and conditions of the Confirmation Memo and Escrow Agreement.

II. This Court and the Utah Supreme Court have upheld the summary enforcement of settlement agreements. Four cases provide strong precedent for the summary enforcement of the present settlement agreement. The cases decided by this Court (Zions, John Deere and Goodmansen) examined the correspondence and conduct of the parties to determine that the summary enforcement of the underlying agreement was proper. A case decided by the Supreme Court (Travelstead) set forth the public policy reasons and standards for summary enforcement of settlement agreements.

Additionally, the preceding cases show that Tri-County's reliance on Crismon v. Western Co. of North America is inappropriate. First, in

Crismon, the parties were not entering an agreement to resolve a dispute. In Crismon, the parties were entering a five year lease agreement. Significantly, a five year lease agreement must be in writing. Additionally, this Court, in a subsequent case, explained that the correspondence in Crismon was preliminary.

III. Summary enforcement of a settlement agreement is appropriate when a settlement bargain is shown and the excuse for nonperformance is comparatively unsubstantial. In the present case, Tri-County received the full benefit of the agreement. Western Rock refrained from filing its mechanic's lien, and in so doing lost its right to secure the debt owed to it. Additionally, Western Rock instituted formal collection proceedings against Precise. Tri-County's only excuse for nonperformance was that the Formalized Agreement was not signed. Tri-County's excuse for nonperformance is comparatively unsubstantial.

IV. Tri-County attempts to create a material issue of fact regarding the Formalized Agreement. Although both parties were negotiating terms of the Formalized Agreement when Tri-County asserted there was no agreement, the Confirmation Memo and Escrow Agreement had already established the underlying or "original agreement." Significantly, Tri-County has not argued that Western Rock failed to comply with the terms of the underlying agreement. Additionally, Western Rock has not attempted to enforce the terms of the Formalized Agreement. Therefore, the expanded terms of the Formalized Agreement are not material to the underlying agreement.

ARGUMENT

I. THE ACTIONS OF THE PARTIES MANIFEST A MUTUAL ASSENT TO BE BOUND.

A binding contract exists when there is mutual assent by the parties manifesting their intent to be bound. See Bunnell v. Bills, 13 Utah 2d 83, 86 (1962). In the present case, both Western Rock and Tri-County intended to be bound pursuant to the terms of Tri-County's signed Confirmation Memo. After an oral agreement was reached, Tri-County sent a signed writing verifying the terms of the agreement. Tri-County's Confirmation Memo documented the "Escrow Conditions," the "Escrow Release Conditions" and the "General Understanding" of the parties. See Tri-County Confirmation Memo to Western Rock (Exhibit "A"). It, therefore, contained all the material and essential terms and conditions of the parties' settlement agreement. Significantly, the day after receiving the Confirmation Memo, Western Rock prepared the Escrow Agreement. The Escrow Agreement contained the terms and conditions set forth in the Confirmation Memo. Tri-County, Western Rock and the escrow agent at Southern Utah Title agreed to and signed the Escrow Agreement. The signed Confirmation Memo and Escrow Agreement set forth in writing the terms and conditions of the contract between Tri-County and Western Rock and manifest Tri-County and Western Rocks' mutual intent to be bound.

Tri-County and Western Rock's performance pursuant to the express terms and conditions of the contract, manifests each parties' intent to be bound by the terms of the agreement. In determining whether the parties to an agreement become bound prior to the drafting and execution of a

contemplated formal writing, commentators and the courts have observed the following:

If the parties act under the preliminary agreement or receive benefits thereunder, they will be held to be bound notwithstanding a formal contract has never been executed. In other words, where parties have entered into a tentative agreement or made a written memorandum of agreement with the understanding that it will be reduced to writing or that a formal contract embracing the same stipulations will subsequently be executed, they may afterwards so act upon the agreement or memorandum as to estop themselves from urging that it was not reduced to writing or formally executed.

17 Am. Jur. 2d Contracts, §38 (1991).

In the present case, both Tri-County and Western Rock performed. Pursuant to the contract, Tri-County signed an escrow agreement, placed \$185,317.26 in escrow and agreed to release from escrow to Western Rock such amount subject to the express conditions that Western Rock forbear filing a mechanic's lien on the Circle Four Project and use its best effort to collect money owed by Precise. See "Conditions" set forth in Tri-County Confirmation Memo (Exhibit "A") and Escrow Agreement (Exhibit "B"). Western Rock did in fact forbear filing a mechanic's lien on the Circle Four Project and within two weeks filed a lawsuit against Precise to collect money owed by Precise. See Complaint against Precise, dated November 20, 1995 (Exhibit "D"). Based on Tri-County and Western Rocks' mutual performance, both Western Rock and Tri-County manifested their mutual intent to be bound.

Tri-County's argument that there is no contract because a formal agreement was never signed is contradicted by its own Confirmation Memo. Tri-County's Confirmation Memo sets forth the terms and conditions of the agreement. Although the Confirmation Memo specifically lists certain conditions under "Escrow Conditions" and "Escrow Release

Conditions,” the Confirmation Memo does not list the signing of an additional document as a condition to the agreement. The Confirmation Memo merely mentions that there is a general understanding that Western Rock's legal counsel would draft the escrow instructions and forward the same to Tri-County. Significantly, Western Rock did draft and all parties did sign the Escrow Agreement. Based on the terms of its Confirmation Memo, it is evident that Tri-County did not consider a formal agreement as a condition to the contract.

The fact that Western Rock and Tri-County signed the Escrow Agreement, is further evidence that Tri-County intended an agreement exist. The Escrow Agreement sets forth in detailed terms the method for depositing funds in escrow and the procedure for disbursing such funds. See Escrow Agreement (Exhibit “B”). By signing the Escrow Agreement and depositing the money in escrow pursuant to the instructions, Tri-County was acknowledging the existence of, and performing pursuant to, the underlying settlement agreement between Tri-County and Western Rock.

Significantly, even if part of the performance of the contract was that Western Rock and Tri-County would enter a more formal agreement in the future, such a fact would not render the underlying contract any less binding. In Bunnell v. Bills, 13 Utah 2d 83 (Utah, 1962), the Utah Supreme Court stated, "The fact that part of the performance is that the parties will enter into a contract in the future does not render the original agreement any less binding." Id., at 87. Additionally, in Lawrence Construction Co. v. Holmquist, 642 P.2d 382, (Utah 1982), in affirming the existence of a settlement agreement, the Utah Supreme Court stated,

The stipulation and letter sent to [respondent] by their terms indicate they were merely to memorialize a previous oral agreement made between the parties. That the parties contemplated subsequent execution of a written instrument as evidence of their agreement did not prevent the oral agreement from binding the parties If a written agreement is intended to memorialize an oral contract, a subsequent failure to execute the written document does not nullify the oral contract.

Id. at 384 (citations omitted). The execution of a more formalized and specific agreement was not a condition to the underlying agreement. Western Rock and Tri-County both performed pursuant to the conditions of the underlying contract. The contract between Western Rock and Tri-County is enforceable despite the contemplation of a more formal agreement.

II. THE SUMMARY ENFORCEMENT OF THE UNDERLYING AGREEMENT IS PROPER.

Public policy favors the settlement of disputes. See Tracy Collins Bank & Tr. Co. v. Travelstead, 592 P.2d 605, 607 (1979) (stating, "Settlements are favored in the law, and should be encouraged because of the obvious benefits accruing not only to the parties, but also to the judicial system.") In the present case, in order to avoid the filing of a mechanic's lien and subsequent judicial intervention, Western Rock and Tri-County entered a settlement agreement. This Court and the Utah Supreme Court have upheld the summary enforcement of settlement agreements. The following cases provide strong precedent for upholding the summary enforcement of Western Rock and Tri-County's agreement.

A. Zions First National Bank v. Barbara Jensen Interiors

In Zions First National Bank v. Barbara Jensen Interiors, Inc. 781 P.2d 478 (Utah App. 1989), Zions Bank was attempting to collect on a promissory note. Zions scheduled depositions of the defendants. At the depositions, settlement negotiations commenced. Zions alleged that a settlement agreement was reached. The defendants argued that the parties, “only agreed that Zions’ attorney would prepare certain documents setting forth a proposed settlement.” Id. Significantly, the depositions were not taken. Therefore, the parties’ performance in Zions (as in the present case) was evidence that an agreement was reached.

After the negotiations, Zions’ attorney delivered the prepared settlement documents to the defendants. Despite repeated requests by Zions’ attorney, the defendants refused to sign the documents. Id. Ultimately, the defendants asserted that no firm settlement had been reached. The defendants stated in their affidavit, “at the time of [negotiations], we believed that no firm settlement was reached; rather, we understood that terms of the settlement were to be prepared by counsel for Zions and put in writing to be signed by us, if we were in agreement to the terms as set forth in writing.” Id. at 480. Despite this assertion by affidavit, the trial court by summary motion held an underlying agreement had been entered into. This Court upheld the trial court’s ruling stating that, “if the [Defendants] did not wish to settle this dispute, they should have clearly expressed such an intention during the settlement conference which was held in lieu of their depositions.” Id. In the present case, Tri-County agreed to settle the dispute, the agreement was documented in writing (to wit: Confirmation Memo and Escrow Agreement), the parties performed

pursuant to this agreement, and attempts were made to execute a more formal settlement agreement. As in Zions, this Court should affirm the summary enforcement of the settlement agreement.

B. John Deere Co. v. A & H Equipment

In John Deere Co. v. A & H Equipment, Inc., 876 P.2d 880 (Utah App. 1994), John Deere asserted that the parties mutually agreed to settle the case and that the trial court properly ordered A & H Equipment (A & H) to comply with their settlement agreement. On the other hand, A & H argued that the parties were in the midst of negotiating the terms of the settlement agreement when John Deere made and the trial court granted John Deere's motion to have the court judicially enforce the proposed settlement agreement. The trial court held a settlement agreement was reached despite the parties' attempts and failures to execute a formalized settlement agreement. Significantly, in affirming the summary enforcement of the agreement in John Deere, this Court distinguished Crismon v. Western Co. of North America, 742 P.2d 1219 (Utah App. 1987) (cited by Tri-County in its Appellate Brief)

In affirming the trial court's order to enforce the settlement agreement, this Court looked at the correspondence that had passed between the parties. First, this Court referenced the case of Crismon and explained that the issue in Crismon was whether the parties had entered into a valid lease agreement. Then, this Court distinguished Crismon explaining that in Crismon the initial correspondence between the parties was preliminary, indicating that negotiations were still ongoing. However, in reviewing the documents in John Deere, this Court looked at two letters and the unsigned settlement agreement and determined that although the

formalized settlement agreement was not signed, the parties minds had met with respect to an underlying agreement based on the previous correspondence. Significantly, the relevant correspondence in the present case is Tri-County's November 7, 1995 "Confirmation Memo" and the Escrow Agreement signed by both parties and Southern Utah Title. Unlike Crismon, the correspondence between Tri-County and Western Rock indicates the existence of an underlying agreement.

Additionally, Crismon can be distinguished from John Deere and the present case based on the underlying cause of action. In John Deere and the present case the issue was whether the parties had entered a settlement agreement regarding an already existing dispute. In Crismon, the issue was whether the parties had entered a five year lease. Significantly, a five year lease is required to be in writing pursuant to the statute of frauds. Therefore, the type of contract at issue in Crismon could not be entered into by oral agreement. Additionally, a five year rental contract is almost universally embodied in a formal lease. Therefore, the parties in Crismon would not reasonably expect to be bound until the formal lease document was signed.

C. Goodmansen v. Liberty Vending Systems

In Goodmansen v. Liberty Vending Systems, 866 P.2d 581 (Utah App. 1993), the primary issue was whether three letters exchanged between the parties constituted an enforceable settlement agreement. This Court affirmed the summary enforcement of the underlying settlement agreement. Significantly, this Court held the three letters exchanged between the parties constituted an agreement despite the fact a formal

settlement agreement was drafted but never signed. In so doing, this Court stated,

It is of no legal consequence that the parties have not signed a settlement agreement. Likewise, "[i]f a written agreement is intended to memorialize an oral contract, a subsequent failure to execute the written document does not nullify the oral contract." . . . "It is a basic and long established principal of contract law that agreements are enforceable even though there is neither a written memorialization of that agreement nor the signatures of the parties, unless specifically required by the statute of frauds." . . . "Parties have no right to welch on a settlement deal during the sometimes substantial period between when the deal is struck and when all necessary signatures can be garnered on a stipulation."

Id. at 584-85 (citations omitted). In the present case, the Confirmation Memo, Escrow Agreement and Solt's Letter referencing the "original agreement" establish the existence of an agreement.

Additionally, in affirming the summary enforcement of the agreement in Goodmansen, this Court focused on the conduct of the parties. This Court stated,

Moreover, the conduct of the parties indicates that both parties believed a settlement agreement had been reached. [Plaintiff] stated repeatedly that he would cancel the trial date once a settlement of the case had been reached. After [Defendant] signed the settlement letters [Plaintiff] canceled the trial set for March 26, 1991, an act consistent with a settlement having been reached. Thus, the conduct of the parties supports the *conclusion that the correspondence between [Plaintiff] and [Defendant], dated March 22, 1991, constitutes a binding settlement agreement.*

Id. at 595. In the present case, Western Rock and Tri-County performed the conditions set forth in the Confirmation Memo and Escrow Agreement. Western Rock and Tri-County's conduct supports the conclusion that a binding settlement agreement existed between the parties.

D. Tracy-Collins Bank and Trust Co. v Travelstead

In addition to stating the public policy reasons for encouraging settlement agreements (see supra p. 12), the Utah Supreme Court in Travelstead set forth a standard for when summary enforcement of a settlement agreement is appropriate. The Court explained the standard as follows: "[S]ummary procedure is admirably suited to situations where, for example, a binding settlement bargain is conceded or shown, and the excuse for non performance is comparatively unsubstantial." Id. at 609. In the present case, a binding settlement bargain is shown. As in Zions, John Deere, and Goodmansen, the underlying documents in the present case and the conduct of the parties establish a binding settlement agreement. Additionally, Tri-County's excuse for non performance is comparatively unsubstantial.

III. TRI-COUNTY'S EXCUSE FOR NONPERFORMANCE IS COMPARATIVELY UNSUBSTANTIAL.

A salient factor in summarily enforcing Western Rock and Tri-County's settlement agreement is that Tri-County's excuse for nonperformance is comparatively unsubstantial. Tri-County received the full benefit of the agreement. Western Rock withheld filing a mechanic's lien and complied with all the terms of the Confirmation Memo and Escrow Agreement. Significantly, Tri-County prolonged negotiations related to the Formalized Agreement until there was no longer the need to protect the Circle Four Project from a lien. After the critical period of the needed forbearance expired, Tri-County asserted there was no agreement. Tri-County provided no excuse aside from the fact that the Formalized Agreement had not been signed. Having refrained from filing its mechanic's

lien, Western Rock lost its right to secure payment of amounts owed for material supplied to the Circle Four Project. The fact that Western Rock refrained from filing a mechanic's lien and complied with all the conditions set forth in Tri-County's own Confirmation Memo renders Tri-County's excuse for non performance comparatively unsubstantial.

IV. TRI-COUNTY'S ATTEMPTS TO DEFEAT SUMMARY JUDGMENT MUST FAIL.

Tri-County attempts to create a material issue of fact in the present case. The only question is whether Tri-County's Confirmation Memo and the ensuing Escrow Agreement formed a binding contract. Significantly, Western Rock has not attempted to enforce the terms of the Formalized Agreement. Additionally, Tri-County has made no allegation that Western Rock has failed to comply with the terms of the Confirmation Memo or Escrow Agreement. Therefore, the expanded terms of the Formalized Agreement are not material with respect to the underlying agreement. The Utah Supreme Court in Horgan v Industrial Design Corp., 657 P.2d 51 (Utah 1982), explained that the mere existence of genuine issues of fact do not preclude summary enforcement of an underlying agreement if the issues are immaterial to resolution of the case. Id. at 752.

In the present case, the terms of the Formalized Agreement are not material. In John Deere, three letters were exchanged between the parties. The defendant argued that the terms in the third letter materially affected the agreement. This Court noted, "While it is true that the third letter from [defendant] to [plaintiff] does in fact introduce the additional term regarding the Farm Plan judgment, we believe that this additional proposal came after the parties had already entered into a binding agreement." John Deere,

876 P.2d at 884 n.7. In the present case, the Confirmation Memo and Escrow Agreement establish an agreement.

Because the Confirmation Memo and Escrow Agreement establish an agreement, the terms of the Formalized Agreement are not material. Although Western Rock and Tri-County continued to negotiate the terms of the Formalized Agreement, the underlying agreement was no less binding. It is clear that Tri-County expected Western Rock to recognize the agreement. Solt's Letter specifically references the "original agreement." See Solt's Letter (Exhibit "C"). It is apparent that on November 8, 1995, when Tri-County wired the escrow funds and was extremely concerned that Western Rock was going to file a mechanic's lien on Circle Four's Project, Tri-County was referencing and relying on an "agreement." Presently, the "original agreement," as referenced in Solt's Letter and set forth in the Confirmation Memo and Escrow Agreement, should be enforced.

CONCLUSION

In conclusion, the undisputed facts show Tri-County and Western Rock intended to be bound by a valid contract. Such intent was evidenced by Tri-County's Confirmation Memo, the Escrow Agreement, and performance of both parties. The lack of a more formal agreement between the parties does not make the original contract between Tri-County and Western Rock any less binding. Therefore, Western Rock respectfully requests that this Court affirm the Fifth Judicial District Court's Summary Judgment of this case. Western Rock further requests that this

Court award its reasonable attorney's fees and expenses incurred as a result of this appeal by Tri-County.

Respectfully submitted this 17th day of July, 1997.

SNOW, NUFFER, ENGSTROM, DRAKE, WADE & SMART

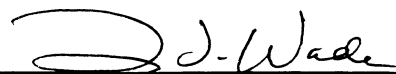


TERRY L. WADE
ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

I, Terry L. Wade, certify that on the 17th day of July, 1997, I served four (4) copies of the attached **BRIEF OF APPELLEE** upon Blaine T. Hofeling, Counsel for the Appellant in this matter, by mailing them to him by first class mail with sufficient postage pre-paid to the following address:

BLAINE T. HOFELING
HIGBEE & JENSEN
250 South Main Street
P.O. Box 726
Cedar City, UT 84721



Terry L. Wade
Attorney of Record

A D D E N D U M

EXHIBIT A

Tri-County's Confirmation Memo dated November 7, 1995



CONFINEMENT SYSTEMS INC.
608 E. EVERGREEN RD.
LEBANON, PA 17042
PH. 717-274-3488
FAX: 717-274-3781

MEMO

DATE: November 7 1995
TO: Western Rock
ATTN: Wayne Smith
FROM: Terry L Weaver
SUBJECT: Escrow Account

As per our conversation yesterday I am confirming our understanding concerning Tri County posting security for the account of Precise Concrete. This is a good faith effort to prevent a lien from being filed on the property of Circle Four Farms. We understand that you want to move promptly and will expedite upon conditions below.

ESCROW CONDITIONS

1. Tri County agrees to escrow \$185,317.26 in interest bearing account with Western legal counsel
2. Western agrees to supply lien waivers for same upon receipt of escrow funds

ESCROW RELEASE CONDITIONS

1. Western shall use its best effort to collect moneys owed and resolve differences with Precise. If this cannot be accomplished in a 6 month period Western has the right to draw on escrow for principle amount with out interest.
2. Tri County receives interest on escrow funds.

GENERAL UNDERSTANDING

1. Western agrees to provide internal documents to Tri County regarding Precise account in order to assist in concluding matters.
2. Western counsel will draw up escrow document & forward to Tri County.

Please correspond with Ron Solt if there are any questions and I am unavailable. I understand that Bart Smith is your contact when you are not in.

SWINE, POULTRY, AND LIVESTOCK EQUIPMENT

EXHIBIT A

EXHIBIT B

Escrow Agreement dated November 8, 1995

EXHIBIT B

November 8, 1995

SOUTHERN UTAH TITLE COMPANY
40 South 100 East
St. George, Utah 84770

RE: Escrow Instructions for Settlement Transaction between Western Rock Products Corporation and Tri-County Confinement Systems, Inc.

Gentlemen:

You are requested to act as escrow agent to handle the transaction outlined in this letter. Your fees shall be paid as outlined in these instructions and the accompanying documents. Any questions may be directed to Terry L. Wade at 628-1611.

Operative Document for Settlement Transaction

will be N/A
You ~~are~~ delivered herewith the operative document outlining the nature and form of the transaction consisting of an Agreement between Western Rock Products Corporation ("Western Rock") and Tri-County Confinement Systems, Inc. ("Tri-County"), dated November 8, 1995, consisting of six pages of text and three pages of exhibits, namely these Escrow Instructions (Exhibit A). Please review this document carefully in order that you may be familiar with the transaction.

Funds To Be Deposited

You will receive funds from Tri-County in the amount of \$185,317.26. These funds (hereafter "Settlement Funds") will be sent by Tri-County on November 8, 1995, via wire transmission to Sun Capital Bank ("Sun Capital") at its branch office located at 80 South 100 East, St. George, Utah. The Settlement Funds shall be payable to Southern Utah Title Company in its capacity as Escrow Agent. You are instructed to obtain from Sun Capital a cashier's check in the amount of the Settlement Funds and to deposit the said cashier's check in a standard interest bearing money market account ("Escrow Account") at Sun Capital. The name of the account shall be Tri-County Confinement Systems, Inc. and Western Rock Products Corporation in trust by Southern Utah Title Company.

Disbursement Instructions

The Settlement Funds are to remain in the Escrow Account for a period of six months, which period shall expire at five o'clock P.M., on May 8, 1996. Immediately following the expiration of the said six-month period, you are instructed to disburse the Settlement Funds, together with accrued interest thereon, as follows:

- (1) Western Rock shall receive the sum of \$185,317.26; and

Southern Utah Title Company
November 8, 1995
Page 2 of 3

(2) Tri-County shall receive a sum consisting of the interest which has accrued upon the Settlement Funds while in the Escrow Account.

The disbursement, aforescribed, shall be performed, automatically, following the expiration of the six-month period, without any further notice or authorization from Western Rock or Tri-County, or from anyone else. There shall be no other conditions relating to or in any way governing or affecting disbursement, except only the expiration of the said six-month period.

General Terms

The fees to set up and administer the Escrow Account shall be \$150.00, and shall be paid by Tri-County to Southern Utah Title Company.

In the event a dispute should arise as between Western Rock and Tri-County with respect to this Escrow Account, the said parties agree to hold Southern Utah Title Company harmless from and against any liability or expense resulting to the latter as the result of such dispute, including the payment of a reasonable attorney's fee and costs.

Should any party default in any of the covenants or agreements herein contained, that defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing the terms of these Escrow Instructions, whether such enforcement is pursued by filing suit or otherwise.

These Escrow Instructions may be amended only in writing signed by the parties to this letter


This Agreement may be executed in several counterparts and by facsimile copies, each of which shall be an original and all of which together shall constitute one instrument.

If the foregoing correctly sets forth your understanding of our agreement for you to act as Escrow Agent, please execute the enclosed copy of this letter in the space indicated below.

WESTERN ROCK PRODUCTS CORPORATION

By 
DARRELL WHITNEY, President

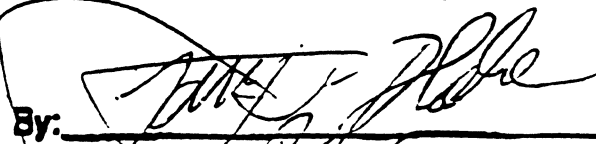
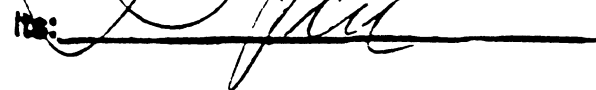
TRI-COUNTY CONFINEMENT SYSTEMS, INC.

By 
Its Chief Financial Officer
Tax ID # 23-2441392

Southern Utah Title Company
November 8, 1995
Page 3 of 3

Accepted by Escrow Agent this 8th day of November, 1995:

Southern Utah Title Company

By: 
Its: 

TW:W:WFP: escrow trust 110895 000000 TW GJ

EXHIBIT C

Solt's Letter dated November 8, 1995



TRI-COUNTY

CONFINEMENT SYSTEMS INC.,
608 E. EVERGREEN RD.
LEBANON, PA 17042
PH. 717-274-3488
FAX: 717-274-3781

November 8, 1995

Mr. Wayne Smith
Western Rock Products Corporation
820 North 1080 East
St. George, Utah 84770

Dear Wayne:

Confirming our conversation of today, I have executed a wire transfer to Southern Utah Title Company, through Sun Capital Bank. I have also returned to you via fax the escrow instructions pending finalization of the original agreement.

I will forward a copy of the proposed changes as soon as I have them worked out.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron Solt", with a long horizontal flourish extending to the right.

Ron Solt

EXHIBIT 3

EXHIBIT D

Precise Complaint dated November 20, 1995

FILED

NOV 22 1995

Paul B. Barty Clerk

TERRY L. WADE - A3882
 SNOW, NUFFER, ENGSTROM, DRAKE, WADE & SMART
 A Professional Corporation
 90 East 200 North
 P.O. Box 400
 St. George, Utah 84771-0400
 801/628-1611
 TW:W:WRP: cm 103195 626343 tw bj

COPY

IN THE FIFTH JUDICIAL DISTRICT COURT
 IN AND FOR BEAVER COUNTY, STATE OF UTAH

WESTERN ROCK PRODUCTS,
 CORPORATION, a Pennsylvania
 Corporation,

Plaintiff.

vs.

PRECISE CONCRETE, INC., an Illinois
 Corporation,

Defendant(s).

COMPLAINT

Civil No. 95-CV-115
 Judge J. Philip Eves

COMES NOW the Plaintiff, by and through its counsel, Snow, Nuffer, Engstrom, Drake, Wade & Smart, a professional corporation, and alleges against the Defendants as follows:

1. Plaintiff, WESTERN ROCK PRODUCTS CORPORATION, is a Pennsylvania corporation doing business in Washington County, State of Utah.
2. Defendant, PRECISE CONCRETE, INC., is an Illinois corporation, doing business in Beaver County, Utah.
3. On or about May 10, 1995, Defendant entered into a Credit Agreement (hereinafter the "Agreement") with Plaintiff WESTERN ROCK PRODUCTS CORPORATION (hereinafter "Western Rock"), whereby Western Rock agreed to furnish materials to Defendant on an open credit account. Said Agreement provided that regular

payments were to be made to Plaintiff by the 15th of each month and that interest would accrue on past due monthly balances at the rate of 21% per annum.

4. Defendant purchased materials on credit from Western Rock between the dates of approximately May 11, 1995, and August 30, 1995.

5. The balance owing on Defendant's account as of October 25, 1995, was \$190,332.37.

6. Western Rock has fully performed under the aforesaid Agreement by supplying Defendant with labor and materials.

7. Notwithstanding Western Rock's performance under the Agreement, Defendant has failed and refused to pay Western Rock the balance of the correct amounts due and owing under the Agreement, with interest, to-wit: \$190,332.37.

8. Western Rock has made demand for the amount owing, but Defendant has wholly failed, neglected and refused to perform under the Agreement by paying all sums due and owing to Western Rock. As a result of Defendant's refusal to pay the sums now due and owing, Western Rock has been damaged in the sum of \$190,332.37, which includes interest, at the rate of 21% per annum to October 25, 1995.

9. Pursuant to the aforesaid Agreement, Defendant agreed to pay all costs of collection and a reasonable attorney's fee to secure the services of an attorney, if needed, to collect monies owed under said Agreement.

10. Plaintiff has, in fact, incurred costs and attorney's fees as the result of Defendant's breach of contract and failure to perform, and is therefore entitled to be reimbursed for the same.

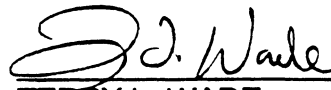
11. By reason of Defendant's failure to pay Western Rock the said sums due and owing for materials supplied under the Agreement, Western Rock is entitled to judgment against Defendant for the full amount owing under said contract to wit:,

(\$190,332.37), as well as the interest that will continue to accrue at the rate of 21% per annum, costs of collection and a reasonable attorney's fee.

WHEREFORE, Plaintiff prays judgment against Defendant PRECISE CONCRETE, INC., for \$190,332.37, the amount owed and past due under the said Agreement which sum includes interest to October 25, 1995, plus the interest that will continue to accrue at the rate of 21% per annum, costs of collection, a reasonable attorney's fee and such other relief as the Court deems just and proper.

DATED THIS 20th day of November, 1995.

SNOW, NUFFER, ENGSTROM, DRAKE,
WADE & SMART
A Professional Corporation

A handwritten signature in cursive script, appearing to read "T. L. Wade", written over a horizontal line.

TERRY L. WADE
Attorneys for Plaintiff

Plaintiff's address is:

820 North 1080 East
St. George, Utah 84770