

2001

Harold K. Beecher v. Salt Lake City Corporation : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Ronald C Barker; Attorney for Plaintiff - Appellant.

Roger F Cutler; Salt Lake City Attorney; Richard S Shepherd; Deputy County Attorney; Attorneys for Defendants-Respondents .

Recommended Citation

Brief of Respondent, *Beecher v. Salt Lake City Corporation*, No. 13610.00 (Utah Supreme Court, 2001).
https://digitalcommons.law.byu.edu/byu_sc2/784

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT 1975
OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY,
J. Reuben Clark Law School

HAROLD K. BEECHER &
ASSOCIATES, INC.,

Plaintiff-Appellant,

vs.

SALT LAKE CITY
CORPORATION and
SALT LAKE COUNTY,

Defendants-Respondents.

Case No.
13610

Brief of Defendants-Respondents
Salt Lake City Corporation and
Salt Lake County

Appeal from the Judgment of the Third District Court
for Salt Lake County
Honorable D. Frank Wilkins, Judge

ROGER F. CUTLER
Salt Lake City Attorney
101 City and County Building
Salt Lake City, Utah 84111

RICHARD S. SHEPHERD
Deputy County Attorney
C-220 Metropolitan Hall of
Justice
Salt Lake City, Utah 84111

Attorneys for Defendants-
Respondents Salt Lake City
Corporation and Salt Lake
County

RONALD C. BARKER
2870 South State Street
Salt Lake City, Utah 84115
Attorney for Plaintiff-Appellant

FILED

TABLE OF CONTENTS

	<i>Page</i>
NATURE OF CASE	1
DISPOSITION OF CASE BY LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	16
POINT I	
WHEN A CONTRACT FOR ARCHITECTURAL SERVICES STATES NO TIME WITHIN WHICH THE ARCHITECTURAL SERVICES THEREUNDER ARE TO BE COMPLETED AND THE FEE OF WHICH IS BASED ON A PERCENTAGE OF THE CONSTRUCTION COST, NO CLAIM FOR ADDITIONAL COMPENSATION FOR CONSTRUCTION DELAY MAY BE ALLOWED TO THE ARCHITECT	16
POINT II	
THE NOVEMBER 10, 1960 SUPPLEMENTAL AGREEMENT, AS A MATTER OF LAW, IS A FULL ACCORD AND SATISFACTION SATISFYING ALL	

CLAIMS FOR COMPENSATION FOR SERVICES RENDERED PRIOR TO THAT DATE. SAID SUPPLEMENTAL CONTRACT WAS ENTERED INTO BY THE PARTIES, SUPPORTED BY VALUABLE CONSIDERATION AND IS A COMPLETE, UNAMBIGUOUS EXPRESSION OF THE PARTIES UNDERSTANDING; AS SUCH IT IS A VALID BINDING AGREEMENT TO BE ENFORCED	23
A. CONSIDERATION	24
B. PAROL EVIDENCE	28
C. ECONOMIC COERCION	28
POINT III	
ITEM NO. 6 CLAIMED BY THE PLAINTIFF-APPELLANT ARCHITECT WHICH THE UNDISPUTED FACTS SHOW ARE NOT PART OF A CLAIM UPON WHICH RELIEF CAN BE GRANTED	32

POINT IV

ALL CLAIMS OF THE PLAINTIFF-APPELLANT ARCHITECT ARE NOT RECOVERABLE FOR FAILURE TO FILE A TIMELY CLAIM AS REQUIRED BY THE PROVISIONS OF 10-7-77 AND SECTION 63-30-1 ET SEQ., UTAH CODE ANN. 1953. FURTHER, THE ENTIRE CLAIM OF THE PLAINTIFF-APPELLANT ARCHITECT IS BARRED BY ITS FAILURE TO FILE SUIT WITHIN ONE

	<i>Page</i>
YEAR AFTER THE DENIAL OF ITS CLAIM AS PROVIDED BY UTAH LAW	33
SUMMARY	42

CASES CITED

<i>Browning v. Equitable Life Assurance Soc.,</i> 94 U.532, 72 P.2d 1060, 1068 (1937)	27
<i>Clayton v. Salt Lake City and Salt Lake County,</i> 15 U.2d 5, 387 P.2d 93 (1963)	10
<i>Hellenic Lines, Inc. v. Dreyfus Corp.,</i> 372 F.2d 753	30
<i>Inland Refineries v. Jones,</i> 206 P.2d 519, 522 (Idaho 1949)	30
<i>Leeper v. Beltrami,</i> 347 P.2d 12 (Calif. 1959)	31
<i>McDonald Brothers v. Whitney County Court,</i> 8 Ky. L. Rep. 874 (1887)	21
<i>Norton v. Michigan Highway Dept.</i> 24, N.W.2d 132	30
<i>Osterling v. First National Bank,</i> 105 A. 633 (Pa. 1918)	19, 20
<i>Price v. The Estate of Havereligh,</i> 428 S.W.2d 422	31
<i>Rainford v. Rytting,</i> 2 U.2d 252, 451 P.2d 769 (1969)	18
<i>State v. Barlow,</i> 107 U.292, 153 P.2d 647 654 (1944)	29

TEXTS CITED	Page
<i>Utah Code Annotated</i> 1953	
10-7-77	14, 35, 36
10-7-78	36
63-30-1 et seq	14, 37, 39
78-12-26(3)	31
77 <i>ALR</i> 2d 803	31
5 <i>Am.Jur.</i> 2d "Architects" § 14 at p. 676	20
28 <i>Am.Jur.</i> 2d "Estoppel & Waiver" paragraph 57 at p. 674	28
17 <i>C.J.S.</i> "Contracts" paragraph 178 at p. 967	30

IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD K. BEECHER &
ASSOCIATES, INC.,

Plaintiff-Appellant,

vs.

SALT LAKE CITY
CORPORATION and
SALT LAKE COUNTY,

Defendants-Respondents.

Case No.
13610

Brief of Defendants-Respondents Salt Lake City Corporation and Salt Lake County

NATURE OF CASE

The plaintiff-appellant commenced this action in the lower court to recover the sum of \$130,079.45 from the defendants-respondents for additional architect's fees allegedly owing to the plaintiff-appellant as a result of the construction of the Metropolitan Hall of Justice in Salt Lake City, Utah.

DISPOSITION OF CASE BY LOWER COURT

At the pretrial hearing, the defendants-respondents moved for summary judgment, judgment on the pleadings and dismissal of plaintiff-appellant's amended complaint as a matter of law. After ten months during which the plaintiff-appellant filed no response to the written memoranda of the defendants below, the lower court granted judgment in favor of defendants-respondents of no cause of action.

RELIEF SOUGHT ON APPEAL

The defendants-respondents seek to have the lower court's Judgment dismissing plaintiff-appellant's complaint affirmed and costs awarded to them.

STATEMENT OF FACTS

The undisputed facts as shown by the pleadings, discovery and the record in this case are as follows:

1. By substantially identical agreements dated March 1, 1960 and May 20, 1960, Salt Lake City Corporation and Salt Lake County contracted with Harold K. Beecher & Associates, a Utah corporation, for it to provide architectural services in connection with the construction of a proposed Public Safety and Jail Building. (See Exhibits I and III attached to the Amended Complaint, R. 27-33, 36-44).

2. During the period from January 1, 1960 to October 6, 1960, the architect prepared preliminary drawings, outline specifications and cost estimates relating to a proposed "High Rise Building", which plans were never approved by the city or county. (See items No. 1 and No. 2 of the Detailed Statement attached as Exhibit VI to the Amended Complaint, R. 47-49, and defendant-respondent Salt Lake City Corporation's Request for Admission of Fact No. 10 admitted by plaintiff-respondent, R. 222, 223, 229).

3. As a result of the disapproval of the preliminary plans for a "High Rise Building", the architect entered into supplemental agreements with the City on November 10, 1960, and the County on December 30, 1960. (See Exhibits II and IV attached to the Amended Complaint, R. 34-35; 36-37). These supplement agreements provided payment of \$36,000 to the architect, recited that the architect had performed services pursuant to its employment contract which had not been approved by the governing bodies of the city and county as required under paragraph 5 of the original contract and then provided as follows:

"1. The parties agree that the aforesaid agreement, together with all the terms and provisions thereof is in full force and effect and shall remain in full force and effect until and unless terminated pursuant to the terms thereof.

"2. The parties agree that the Architect has performed services under the terms of the aforesaid agreement of a value to the owner of \$18,000 and that this amount would be due and

owing by the Owner to the Architect if the work done by the Architect had in fact been approved by the Owner.

"3. The Owner hereby agrees to pay the Architect the sum of \$18,000 and does in this instance, only, waive the provision of prior approval before making such payment.

"4. The Architect, in consideration of the payment herein stipulated, acknowledges that under the terms of the aforesaid agreement he is not entitled to be paid for any work done until the same is approved by the Owner, acknowledges that the waiver embodied herein does not in any way affect any subsequent payment or payments which may become due under the terms of the aforesaid agreement; and *further acknowledges that the amount of \$18,000 herein stipulated constitutes full payment for all services rendered by the Architect as of the date of this addendum and that the Architect will not be entitled to any further or additional payments from the Owner until such time as other stages of the Architect's work have been completed and approved by the Salt Lake City Board of Commissioners, as provided in the aforesaid agreement. The \$18,000 paid pursuant hereto shall be deemed to be part of the total fee due the Architect under said agreement.*" (Emphasis added)

Thus, rather than terminate its contract with the Architect when the Preliminary Plans and Drawings were not accepted, the City and County paid \$18,000 each, for a total payment of \$36,000. This payment was made for unapproved services performed by the Architect to November 10, 1960. The parties, by said

Supplemental Agreements, elected and agreed to proceed under the original contract with a new design concept and agreed that the \$36,000 paid to and received by the Architect under the Supplemental Agreements was for benefits to the City and County and would apply against its total fee on the project. (R. 34-35, 36-37).

4. The redesigned project was ultimately approved, bids were obtained, and the contract for construction was let. Work under said construction contract was commenced on June 19, 1963 and construction of the project was completed on or about March 21, 1968. (See Item No. 4 of the Detailed Statement attached as Exhibit VI to the Amended Complaint, R. 64-68).

5. The Architect's contracts with the City and County dated March 1, 1960 and May 20, 1960, respectively, fixed no time within which the services thereunder were to be completed by the Architect; rather, they clearly contemplated an extended period of construction by requiring additional payment for on-site inspection if such expense exceeded \$15,000.00. Paragraph 7 of the Architect's contract with the City and County specifically provided as follows:

"7. GENERAL ADMINISTRATION.
The Architect shall furnish at his expense a qualified on-site inspector, acceptable to both Owner and Architect, *during the entire time the construction work is in progress*, whose duties shall consist of checking all shop drawings, for approval of the City Engineer, to determine the

quality and acceptance of the material and/or equipment proposed to be used in the facilities being constructed; to supervise and inspect all phases of the work being done.

..“*The costs, to be paid by the Architect for the above services to be rendered, shall not exceed \$15,000.00. In the event these services exceed this amount, it is hereby agreed by all concerned that the Owner shall assume all costs in excess thereof.*” (Emphasis added) (R. 30).

6. The City and County did pay to the plaintiff-appellant Architect the amount of \$26,825.20 for the additional on-site inspection in accordance with the foregoing paragraph 7. (See defendant-respondent Salt Lake City Corporation’s Request for Admission of Fact No. 7 which is admitted by the plaintiff-appellant, R. 222, 228).

7. The plaintiff-appellant received the sum of \$609,385.59 for its Architect’s fees on the Metropolitan Hall of Justice, which sum does not include the amount of \$26,825.20 for additional on-site inspection. (See defendant-respondent Salt Lake City Corporation’s Request for Admission of Fact No. 9, admitted by plaintiff, R. 222, 229).

8. The plaintiff-appellant allegedly filed its claim for additional compensation dated January 22, 1969, with the defendant-respondents on or about January 28th or 29th of 1969. (See paragraph 4 of the Amended Complaint and Exhibits V and VI attached thereto, R. 24, 47-70). Under the Detailed Statement, the

architect-appellant alleges that the City and County respondents are indebted to it in the total amount of \$130,079.45 for eight separate items of alleged extra services. Its claim is based on paragraph 4 of its original Agreement with the City and County, which reads as follows:

"4. EXTRA SERVICES AND SPECIAL CASES. If the Architect is caused extra drafting or other expenses due to changes ordered by the Owner, or due to the delinquency or insolvency of the Owner or the Contractor, or as a result of damage by fire, he shall be equitably paid for such extra expense and the service involved.

"Work let on any cost-plus basis shall be subject to a special charge in accord with the special service required.

"If any work designed or specified by the Architect is abandoned or suspended, in whole or in part, the Architect is to be paid for the service rendered on account of it."

These separate claims of plaintiff-appellant are as follows:

A. Item No. 1: A claim of \$6,750.00 for the alleged attendance of two architect employees at approximately 75 meetings of the Citizens Advisory Committee and its Executive Committee. The plaintiff-appellant was unable to provide to the lower court information as to the dates, locations and names of persons in attendance at said alleged meetings. Rather, plaintiff-appellant simply indicates that such meetings occurred as a result of the change in the basic design con-

cept from a "high rise" building on or about November 10, 1960, when the supplemental agreement with Salt Lake City was executed. (See defendant Salt Lake City Corporation's Interrogatory No. 2 and plaintiff's answer thereto, R. 213, 214, 238-240). However, by the plaintiff-appellant's own statement it was "The Citizen's Advisory Committee who directed the architect to abandon the preliminary drawings, the outline specifications and the cost estimates that had been proposed for a "High Rise Building" and that such drawings, specifications and cost estimates were proposed during the period from January 1, 1960 to October 6, 1960. See Item No. 2 of the Detailed Statement attached as Exhibit VI of the Amended Complaint. (R. 60-63). Thus, October 6, 1960 constituted the finale for the "High Rise" concept and the intervention of the Citizen's Advisory Committee in the architect's redesign program. The Citizen's Advisory Committee asked the architect to re-analyze the Michael Saphier space analysis dated August 24, 1960, which resulted in a 5-page report, submitted about October 6, 1960, and revised October 11, 1960, following which the decision to redesign the building was made. (See plaintiff-appellant's answer to Salt Lake City Corporation's Interrogatory No. 5 (a). (R. 216, 241). The plaintiff-appellant architect was fully paid for these services under the November 10, 1960 Supplemental Agreement. (R. 34-35, 36-37).

B. Item No. 2: A claim in the amount of \$20,-981.30 for alleged indirect and direct expenses in connection with the preparation of preliminary drawings, outline specifications and cost estimates for a "High Rise Building" which were

never approved by the city and county. The claim specifically states that these services were performed "(d)uring the period January 1, 1960 to October 6, 1960 . . ." (See Item No. 2 on pages 2-4 of the Detailed Statement attached as Exhibit VI to the Amended Complaint, R. 60-63). Such services were expressly covered by the Supplemental Agreements between the architect and the City and County dated November 10, 1960 and December 30, 1960. Under these agreements the architect accepted \$36,000.00 in "full payment for all services rendered by the architect as of the date of this addendum . . ." (See Exhibits II and IV attached to the Amended Complaint, R. 34, 35, 45, 46).

C. Item No. 3 is not a subject of this appeal.

D. Item No. 4 is the major claim of the architect and totals the sum of \$95,893.15 for alleged delay in the completion of the project by constructing the building complex in two phases to permit utilization of the temporary police building on the site, until the new police building was constructed. The architect alleges that there was an increase of construction time from 739 calendar days to 1,736 calendar days by reason of the foregoing. Said construction period allegedly lasted from June 19, 1963 to March 21, 1968. (See Item No. 4 of the Detailed Statement attached as Exhibit VI to the Amended Complaint, R. 64-68).

However, the architect's contracts with the City and County fixed no time within which its services thereunder were to be completed, but specifically provided for payment by the City and County of on-site inspection costs in excess of

\$15,000.00. (See paragraph 7 of Exhibit I attached to the Amended Complaint, R. 30-31). The City and County paid the architect \$26,825.20 for additional on-site inspection in accordance with said agreement. (See Salt Lake City Corporation's Request for Admission of Fact No. 7 which is admitted by plaintiff-appellant, R. 222; 228). Furthermore, the plaintiff-appellant received 75% of its basic fees prior to the time construction even commenced on the project. (See paragraph 5 of Exhibit I attached to the Amended Complaint, R. 29, 30, and Salt Lake City Corporation's Request for Admission of Fact No. 34, admitted by plaintiff-appellant, R. 226; 332).

E. Item No. 5 is not a subject of this appeal.

F. Item No. 6: A claim of \$1,250.00 for alleged time expended by Harold K. Beecher in "assembling documents and information instructing City Attorney, writing letters, giving deposition, attending District and Supreme Court hearings, etc." in connection with the taxpayer's suit against Salt Lake City and Salt Lake County for awarding the jail equipment contract to the second low bidder.

That case, *Clayton v. Salt Lake City and Salt Lake County*, 15 U.2d 57, 387 P.2d 93, was decided December 2, 1963, and affirmed the award of a contract to the second low bidder, Southern Steel Company, whose price was over the low bidder by a sum of \$55,321.00. (See decision of this court and Salt Lake City Corporation's Request for Admission of Facts No. 17 and 18, admitted by the plaintiff-appellant, R. 224; 231). The architect's fee on the said jail equipment contract was ten percent (10%) of

the construction cost thereof. (See paragraphs B and 3 of Exhibit I attached to the Amended Complaint, R. 27, 29, and Salt Lake City Corporation's Request for Admission of Fact No. 19, admitted by the plaintiff-appellant, R. 224; 231). Therefore, the successful defense of that case resulted in the architect receiving \$5,532.10 more than it would have received had said suit been successful in requiring the letting of the jail equipment contract to the low bidder.

Assistant Salt Lake City Attorney Jack L. Crellin handled the city's defense in the *Clayton* case from its inception to its conclusion and spent only one afternoon with Mr. Beecher at his home with respect to preparation of an affidavit to be filed in support of the city's motion for summary judgment in said case. (See Salt Lake City Corporation's Request for Admissions of Facts Nos. 22 and 24, admitted by plaintiff-appellant, R. 231). Neither Mr. Crellin nor the Board of Commissioners of Salt Lake City ever requested the plaintiff-appellant or Harold K. Beecher to attend the hearing on the motion for summary judgment before the District Court or an argument on appeal before the Supreme Court of the State of Utah in said suit. (See Salt Lake City Corporation's Request for Admission of Facts No. 25, admitted by plaintiff-appellant, R. 225; 231). The city received no benefit from his attendance, which was done solely out of his own interest and curiosity.

G. Item No. 7: A claim in the amount of \$3,000.00 for alleged preparation of space analysis surveys required by the Citizen's Advisory Committee when it decided the Michael Saphier space analysis dated August 24, 1960, was in-

correct. The final 16 page analysis survey was prepared and submitted by the architect to the City and County on or about December 1, 1960, with subsequent revisions on or about December 15, 1960, and January 3, 1961. They were entirely completed prior to February 1, 1961. (See Salt Lake City Corporation's Request for Admissions of Facts Nos. 27 and 28, admitted by plaintiff-appellant, R. 225; 231, and plaintiff-appellant's answer to Salt Lake City Corporation's Interrogatory No. 5(a), R. 216, 217; R. 241, 242.) The architect had earlier submitted a 27 page space analysis report dated May 16, 1960, and a 5 page space analysis report about October 6, 1960, which was revised about October 11, 1960, after which the architect was directed to redesign the building. (See plaintiff-appellant's answer to Salt Lake City Corporation's Interrogatory No. 5(a), R. 216, 217; 241, 242.)

H. Item No. 8: A claim of \$1,000.00 for alleged preparation of square foot drawings and computations to determine the amount of space to be occupied by the city, the county and jointly in the Metropolitan Hall of Justice. The first of such drawings and computations was made in September or October of 1960, with respect to the high rise building, the second submittal was early in the design stage of the present building, the third was in response to a request prior to December 22, 1964, and the last was submitted about February 14, 1966 with the final revision thereof submitted about October 6, 1966. (See plaintiff-appellant's answer to Salt Lake City Corporation's Interrogatory No. 7 (a), R. 217, 218; 242, 243). The plaintiff-appellant admits that all services included under Item No. 8

were performed prior to October 7, 1966. (See Salt Lake City Corporation's Request for Admissions of Facts No. 33, admitted by plaintiff-appellant, R. 226; 232).

9. In December, 1965, the plaintiff-appellant commenced an action in the District Court of Salt Lake County against Salt Lake City Corporation, designated as Civil No. 161546, in which the plaintiff sought recovery against the City for several claims allegedly due for services rendered and money expended under the terms of the same contract attached as Exhibit I to the plaintiff-appellant's Amended Complaint in this action. However, none of the claims included in Items No. 1, No. 2, No. 6 and No. 7 herein were asserted in that prior action. (See Salt Lake City Corporation's Request for Admissions of Facts Nos. 29 and 30, admitted by plaintiff-appellant, R. 225; 231, 232.)

10. ~~Expecting~~^{Excepting} only inspection duties, the last work on the project by plaintiff-appellant architect was prior to October 11, 1966. (R. 217, 218, 242, 243). The plaintiff-appellant architect filed no claim with the City or County for the claims subject of this suit until subsequent to January 22, 1969. (R. 47).

11. The claims of plaintiff-appellant were denied in writing by City Attorney Jack L. Crellin, February 9, 1970, who stated that plaintiff-appellant owed the city \$249.84. (R. 92). On March 6, 1970, the plaintiff-appellant filed a Second Petition, wherein he requested of the City and petitioned the County Commission for arbitration regarding his January 22, 1969 claim. (R.

72). The County Attorney advised against such a procedure in that the claim was deemed denied under the provisions of 63-30-14, *Utah Code Annotated* 1953, and the letters of the City Attorney of February 9, 1970. (R. 73). Both the City and County refused arbitration as requested in the second petition. (R. 76, 77).

12. The plaintiff-appellant failed to file suit until April 2, 1971, approximately 2 years 3 months after filing its claim. (R.1). This suit was commenced more than one year after the claim's denial by the City and County. (Sections 10-7-77 and 63-30-1 et seq. *Utah Code Ann.* 1953; R. 73; R. 76, 77; R. 180).

13. On June 13, 1972, plaintiff-appellant's attorney certified to the court:

(a) "That he had interviewed all witnesses he might call at the trial of the case;"

(b) "That all needed drawings and documents, etc., are ready to be offered in evidence;"

(c) "... all necessary discovery had been completed;"

(d) "All necessary examination and deposition had been concluded." (R. 210)

14. The matter was set for trial January 12, ¹⁹⁷³~~1972~~. (R. 211). Thereafter, on December 5, 1972, plaintiff appellant requested a pretrial conference. (R. 235). Said conference was approved and subsequently held before Judge D. Frank Wilkins, February 22, 1973 and

March 5, 1973. (R. 237, 246, 247). At said hearing, a motion for summary judgment to dismiss on pleadings and judgment on pleading were received and upon request leave was granted to submit memoranda of law. Defendants submitted theirs on or about March 8, 1973. (R. 249, 251, 255). Plaintiff-appellant filed no response for more than 10 months. The Lower Court after studying the matter entered judgment in favor of defendants Salt Lake City and Salt Lake County January 22, 1974 on six of the eight claims, but reserved for trial the remaining issues and a counter-claim for trial. (R. 249, 250).

15. Plaintiff-appellant filed a "Petition for an Intermediate Appeal" on or about February 22, 1974. This request was denied March 5, 1974. (Utah Supreme Court case Number 13605). At the same date of filing said petition, plaintiff-appellant filed a "Notice of Appeal" with the Third District Court. (R. 278). Despite the Petition for Intermediate Appeal's denial, plaintiff-appellant filed an appeal brief with this court. Defendant-respondent Salt Lake City filed a Motion to Dismiss said appeal, which the court took under advisement. Subsequently, the parties stipulated to a dismissal of the matters reserved for trial and this brief is submitted on the matters subject of Judge Wilkins Pre-Trial Judgment decision.

ARGUMENT

POINT I

WHEN A CONTRACT FOR ARCHITECTURAL SERVICES STATES NO TIME WITHIN WHICH THE ARCHITECTURAL SERVICES THEREUNDER ARE TO BE COMPLETED AND THE FEE OF WHICH IS BASED ON A PERCENTAGE OF THE CONSTRUCTION COST, NO CLAIM FOR ADDITIONAL COMPENSATION FOR CONSTRUCTION DELAY MAY BE ALLOWED TO THE ARCHITECT.

Item No. 4 of plaintiff-appellant's detailed statement, dated January 22, 1969 and attached as Exhibit VI to plaintiff-appellant's amended complaint, constitutes a claim against the defendants-respondents to the amount ~~of~~ ^{of} \$95,893.15. It was submitted to defendants-respondents as a demand for additional compensation above a fixed six percent architectural fee agreement. Plaintiff-appellant alleged the claim is for expenses caused by delay in the construction time required for the completion of the Metropolitan Hall of Justice. It is plaintiff-appellant's contentions that such period of time was not contemplated by the parties when they entered into the original contract for architectural services.

Importantly, however, it should be noted that the contract for the construction of the complex was actually completed within the time prescribed in the con-

struction contract. Further, the undisputed facts disclose that the plaintiff-appellant's contracts with the City and County fix no time within ^{which} the architectural services thereunder were to be completed. Rather, his compensation was to be a fixed fee of six percent of the construction cost. (R-27). However, extra compensation was agreed to be paid if: (a) Changes were made in approved drawings; (b) Expenses were incurred by "delinquency" or "insolvency" of the owner or contractor; or (c) Expenses were incurred because work designed or specified on the approved project was abandoned or suspended. See paragraph 4 of the parties agreement, Statement of Fact 7 supra at p. 6; R-29. Since none of these agreed contingencies are even alleged to have precipitated this claim, the clear contract provisions for a fixed six percent fee bars extra compensation under the explicit terms of the contract as a matter of law.

Plaintiff-appellant architect, however, asserts parol evidence should be admitted to show intent. In that assertion the architect does not show how the written agreement between the parties or its supplements are vague or ambiguous as to need clarification. Rather, he seeks parol evidence, to create a new term which was not part of the written integration of the parties understandings, which agreements generously paid to the architect over \$609,000.00 as a six percent architectural fee based on the construction cost.

This court has consistently denied the use of parol evidence to modify such an integrated, complete state-

ment of terms in a written contract. The court has correctly observed:

“The rule is well settled, that where the parties reduce to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, *be conclusively presumed that the writing contained the whole of the agreement between the parties and that is a complete memorial of such agreement, and that parol evidence of the contemporaneous conversation, representations, or statements will not be received for the purpose of varying or adding to the terms of the written document.*” *Rainford v. Rytting*, 22 U.2d 252, 451 P.2d 769 (1969) (Emphasis added)

Further, in the case before the bar, the contract itself is clear that the parties contemplated an extended construction period and made provisions for extra pay to the architect for such expenses. The agreement provided that the architect was to:

“Furnish at his expense a qualified on-site inspector, acceptable to the owner and architect, *during the entire time the construction work is in progress, . . .*” (Paragraph 7 of the party’s contract attached as Exhibit VI to plaintiff-appellant’s amended complaint, R. 30) (Emphasis added)

Also, under the said contract, the architect was to pay the cost of providing all inspections; however, such cost was not to exceed the sum of \$15,000.00. The agreement specifically provided that:

“In the event these services exceed this amount, it is hereby agreed by all concerned that the owner (Salt Lake City and County) shall

assume all costs in excess thereof.” (Paragraph 7 of the contract between the parties, R. 30).

Pursuant to the provisions of the contract, plaintiff submitted a bill for and received the sum of \$26,825.20 for additional on-site inspections. Not only did the plaintiff-appellant architect receive the above stated benefits, but on November 10, 1960, entered into a supplemental agreement with the defendants-respondents whereunder he agreed to receive a total of \$36,000.00 for work done but not approved, knowing that a new type of design was desired. (R. 34) This amended agreement incorporated by reference the earlier agreement and made no amendment with regard to a specified time for construction completion or payment for delays which would follow starting over on the project.

Thus, it is absolutely clear that under the terms of the agreement the parties intentionally did not fix the time within which the architect's services were to be completed; rather, they expressly recognized that the construction period could extend beyond the time fixed by the on-site inspection to be provided by the architect. Under these circumstances, the law is clear that the plaintiff is not entitled to additional compensation as alleged and parol evidence is not admissible to modify the agreement.

Supportive of this conclusion is the case law dealing specifically with this issue. Thus in the case of *Osterling v. First National Bank*, an architect sued to recover additional compensation for delay in the con-

struction of a bank building, claiming that changes were made in the details of the structure which almost doubled the original contract cost and delayed completion of the project for some eight months. The court specifically held that the architect was not entitled to extra compensation because of the delay in the construction of the building, where the contract fixed no time within which his services were to be completed. The court specifically stated:

“The claim for compensation for delay is also without merit. The contract under which he claims fixes no time within which his services were to be completed. The building actually cost almost double the amount originally contemplated and his commissions were correspondingly increased. This was adequate compensation for the delay incident to the construction of the enlarged building, but this is not the reason for our refusal to allow his claim. He was not entitled to make it under the contract which he himself prepared.” *Osterling v. First National Bank*, 105 A. 633 (Pa. 1918); 5 *Am.Jur.2d*, “Architects.” § 14 at p. 676.

The case before the bar is virtually identical facts ~~as~~ ^{of} the *Osterling* case. Here the total cost of the Metropolitan Hall of Justice was increased considerably from that envisioned at the time the contract was executed in March 1960. Extra work orders alone increased the plaintiff-appellant architect's fees in excess of \$42,000.00. (See defendant Salt Lake City Corporation's Request for Admissions of Facts Nos. 3 and 5, admitted by plaintiff; R. 221, 228).

An additional case illustrative and supportive of this principle that an architect may not receive an additional fee on an architectural percentage contract when that contract does not fix a time for completion, is *McDonald Brothers v. Whitney County Court*, 8 Ky. L. Rep. 874 (1887) as discussed in Annotation, 20 A.L.R. 1356, 1360-1361. As in the case before the bar, the architect's contract contained no limitation or conditions as to the time for the construction of the building. However, the architect was obligated to superintend the construction of the project for a specified fee. Also, the construction contract contained a provision that if any charges were made by the architect for supervision of the construction work which extended longer than the specified time agreed upon for the completion of the building of the project, such charges would be deducted from the amount of the construction contract price for the benefit of the architect. Thereafter, the original contractor abandoned the project and it was let to a second building contractor, who refused to agree to the provisions for deductions for additional architect's charges. The architect then sought to recover for the delay involved in the completion of the work.

The court held that inasmuch as the architect's contract was for a definite sum without limit or condition as to time, he could not recover on the theory that the provisions of the building contract modified his own contract. Again the rule is consistent and unequivocal. An architect may not recover for the delay in the

construction time unless his contract so provides by a specific limitation as to the time within which his services are to be performed.

In the instant case, the facts are clear and undisputed that the plaintiff-appellant agreed to provide architectural services, including superintending the construction of the project, for six percent of the construction fees; it is without dispute that this fee of over \$609,000.00 was fully paid. There was no time in the contract set for completion; rather, this contingency was covered by a provision indemnifying the architect for any out-of-pocket inspection expenses he incurred should those expenses exceed the expense contemplated in the contract. The plaintiff-appellant indeed received full additional compensation for these services of approximately \$27,000.00, almost double the \$15,000.00 base expense figure in the ~~parties~~^{parties} agreement.

Further, it is without dispute that the plaintiff-appellant architect received an additional sum exceeding \$42,000.00 by virtue of extra work orders in the agreement. In addition, the parties had knowledge that the first preliminary drawings were not accepted and signed a supplemental agreement knowing delay was evident, without amending the fee arrangements and without setting a time limit for completion.

Therefore, it is respectfully submitted that the lower court properly held that Item No. 4 claimed by the architect failed to state a claim upon which relief can be granted and that the defendants-respondents were entitled to a judgment of no cause of action as a matter of law on this issue.

POINT II

THE NOVEMBER 10, 1960 SUPPLEMENTAL AGREEMENT, AS A MATTER OF LAW, IS A FULL ACCORD AND SATISFACTION SATISFYING ALL CLAIMS FOR COMPENSATION FOR SERVICES RENDERED PRIOR TO THAT DATE. SAID SUPPLEMENTAL CONTRACT WAS ENTERED INTO BY THE PARTIES, SUPPORTED BY VALUABLE CONSIDERATION AND IS A COMPLETE, UNAMBIGUOUS EXPRESSION OF THE PARTIES UNDERSTANDING; AS SUCH IT IS A VALID BINDING AGREEMENT TO BE ENFORCED.

Items No. 1 and No. 2 of plaintiff-appellant architect's claim concern a request for payment for attending some 75 meetings alleged to have been attended by it and for unapproved architectural services rendered prior to November 10, 1960, totalling some \$27,-731.30. The assertion is utterly perplexing in view of a clear and unambiguous agreement of November 10, 1960 whereunder plaintiff-appellant architect agreed to and in fact accepted \$36,000.00 as payment for all services rendered prior to that date. It is also perplexing in view of the fact that the city and county were not appraised of its claim or its intention to make such a claim for a period of in excess of eight years from the date of this supplemental agreement. (R-24)

The claim is the furthermore startling in that after receiving the \$36,000.00 cash benefit, plaintiff-appel-

lant architect in this litigation now challenges the validity of the supplemental contract by alleging: (a) It is void for lack of consideration; (b) The agreement does not mean what it clearly states and that the architect should be able, by parol evidence, to have a trial on its intent; and (c) It is invalid because it was obtained by economic coercion. See page 9-13 of plaintiff-appellant's Brief. These matters will be discussed separately.

A. CONSIDERATION

The facts are undisputed that on the 1st day of March, 1960 and on the 20th day of May, 1960, the parties entered into substantially identical agreements whereunder the city and county agreed to pay the architect a fee of six percent of the construction cost of a project for the construction of the Metropolitan Hall of Justice. Said agreement provided that payment to the architect would be made on a schedule as follows:

“Upon completion of the schematic studies *and proper approval of the same*, a sum equal to ten percent of the Basic Rate, computed upon a reasonable estimated cost.”

“Upon completion of the preliminary studies *and proper approval of the same*, a sum equal to fifteen percent of the Basic Rate, computed upon a reasonable estimated cost.” (R. 29) (Emphasis added)

Significantly, none of this work performed by the architect prior to November 10, 1970 was satisfactory

to the defendants-respondents and was never approved. Rather, after seeing the preliminary work, it was determined that the "high rise" concept was not desired and a new design approach should be undertaken. Therefore, the parties entered into a supplemental agreement whereunder compensation would be made to the architect for the unapproved work and expenses he had incurred therein, to keep the prior contract in full force and effect, and waive a provision in the earlier agreement regarding prior approval. The said supplemental agreement dated with Salt Lake City, November 10, 1960 and December 30, 1960 with Salt Lake County specifically states as follows:

"4. The architect, *in consideration of the payment herein stipulated*, acknowledges that under the terms of the aforesaid agreement he is not entitled to be paid for any work done until the same is approved by the owner; and acknowledges that the waiver embodied herein does not in any way affect any subsequent payment of payments which may become due under the terms of the aforesaid agreement; *and further acknowledges that the amount of \$18,000.00 (\$18,000.00 for each of the city and county governments, for a total of \$36,000.00) herein stipulated constitutes full payment for all services rendered by architect as of the date of this addendum* and that architect will not be entitled to any further or additional payments from the owner until such time as other stages of the work have been completed and approved by the Salt Lake City Board of Commissioners, as provided in the aforesaid agreement. The \$18,000.00 paid pursuant hereto shall be deemed to be a part

of the total fee due the architect under said agreement.” (R-35, R-46) (Emphasis added).

Thus, the parties clearly and unequivocally acknowledged in writing in the original contract that the architect was entitled to no compensation for unapproved work. Under the supplemental agreement the architect received \$36,000.00 for unapproved work, at variance to the legal obligation of the defendants-respondents under the original contract. Also, the architect received benefit of accelerated payments from those scheduled in the original contract, in addition to an affirmation of a contract that could have been cancelled without compensation to the architect if no acceptable plans had been developed by it. See Contract, R. 27-33.

Certainly, any one of those benefits given to the plaintiff-appellant architect and the concession by the city and county constitutes sufficient consideration for the agreement. That fact is true notwithstanding the fact that the Supplemental Agreement was really a bilateral contract; that is, a modification by mutual agreement of the original understanding of the parties. Clearly, the contract is valid and supported by adequate consideration.

If further discussion is necessary, under the doctrine of accord and satisfaction, there was consideration as a matter of law. The Utah Supreme Court has correctly observed:

“An accord is an agreement between parties, one to give or perform, the other to receive or

accept, such agreed payment or performance in satisfaction of a claim. The 'satisfaction' is the consummation of such agreement. Settlement of an unliquidated or disputed claim where the parties are a part in good faith presents such consideration." *Browning v. Equitable Life Assurance, Soc.*, 94 U .532, 72 P.2d 1060, 1068 (1937).

If the plaintiff-appellant architect did in fact make a claim for work done prior to November 10, 1960, the City and County could refuse to pay under the terms of the first agreement because no approval had been given. The claim was therefore unliquidated and a disputed claim. Settlement of such a claim was an accord and satisfaction supported by adequate consideration as a matter of law.

Also, it is clear that by acquiescence the plaintiff-appellant architect is estopped to deny the validity of the Supplemental Agreement by virtue of the benefits it has received and the time that has elapsed without complaint. As previously stated, the plaintiff-appellant received \$36,000.00 on or about November 10, 1960. In addition, it received the benefit of proceeding with the agreement as modified by the Supplemental Agreement for a period of time between November 10, 1960 and his claim for payment dated January 22, 1969. This is a period in excess of eight years. The law of estoppel and waiver is clear that he cannot at that late date challenge the agreement. The rule is summarized as follows:

"The rule is that where a party with full knowledge, of his rights and of all the material

facts, remains inactive for a considerable time or abstains from impeaching a contract or transaction, or freely does what amounts to a recognition thereof as existing, or acts in a manner inconsistent with its repudiation and so as to affect or interfere with the relation and situation of the parties, so that the other party is induced to suppose that it is recognized, this amounts to acquiescence and the transaction, although originally impeachable, becomes unimpeachable." 28 *Am. Jur.* 2d "Estoppel & Waiver" p. 674, paragraph 57 and cases therein cited.

It is respectfully submitted that the Supplemental Agreement of November 10, 1960 is supported by adequate consideration, is valid and that even accepting *arguendo* that it lacked consideration, the architect is estopped to challenge its validity.

B. PAROL EVIDENCE

A discussion of this issue has been made *supra* at p. 18.

C. ECONOMIC COERCION

The plaintiff-appellant nakedly alleges in its Complaint and in answers to Requests for Admissions that the Supplemental Agreement of November 10, 1960 was void because it was obtained by economic coercion. See R-29 and p. 11 of plaintiff-appellant's brief. Again, the defendants Salt Lake City and Salt Lake County were surprised by this announcement in view of the more than eight year lapse of time since the architect executed the Supplemental Agreement

and the lapse of over a year between the time the project had been fully constructed and the first time the issue is raised.

Further, it is interesting that at the pre-trial conference requested by the plaintiff-appellant March 5, 1973, the appellant architect was unable to establish any significant facts, after two years of trial preparation, to support this charge. Even after filing a Motion for Reconsideration, the architect made no proffer of proof. See R. 260-273.

Further, the law regarding a claim of this type is clear that a contract alleged to have been obtained by duress (coercion) or undue influence is not void; rather it is only voidable at the option of the person coerced. This court has succinctly observed:

“Generally, the consequence of duress are *voidable only*, not void.” *State v. Barlow*, 107 U. 292, 153 P.2d 647, 654 (1944) (Emphasis added)

Further, one cannot accept the benefits of a contract and later attempt to void it on the grounds of coercion. This court has correctly observed:

“As a rule, in a transaction requiring mutual consent, if the consent is obtained by coercion, the victim may either affirm or void the transaction, but *he may not claim the benefits and escape the obligations.*” *State v. Barlow*, id. at p. 654. (Emphasis added)

In addition, the law is clear that the coercion necessary to enable one to void a contract must constitute such an overreaching as to be wrongful, unlawful or

unconscionable to the court. Federal courts have correctly observed:

“A finding of duress at least must reflect a conviction that one party to a transaction was so improperly imposed upon by the other that a court should intervene.” *Hellenic Lines, Inc. v. Dreyfus Corp.*, 372 F2d 753 (Emphasis added). See also, 17 *C.J.S.*, “Contracts” paragraph 178 at p. 967.

Using these legal principles, the courts have consistently held that mere need or difficult financial circumstances are not sufficient. The Michigan Court noted:

“The fact that a contractor was ‘hard-up’ when he signed the release of claims was not in itself sufficient to constitute duress. *Norton v. Michigan Highway Dept.* 24 N.W.2d 132.

Our sister state Idaho also noted and observed:

“Business compulsion is not established merely by proof that consent is secured by pressure of financial circumstances, or that one party insisted upon a legal right and the other party yielded to such insistence. Neither will a mere threat to withhold from a party a legal right which he has adequate legal remedy to enforce, constitute duress. Generally the demand must be wrongful or unlawful, and the other party must have no other means of immediate relief from the actual or threatened duress than by compliance with the demand.” *Inland Refineries v. Jones*, 206 P.2d 519, 522 (Idaho 1949).

Plaintiff's complaint fails to make allegations even to state a claim in these regards; rather, it affirms

that the supplemental contract "modified" the original without even challenging its validity. See plaintiff-appellant's amended complaint, R. 23-26. Also, the undisputed facts show that there was no voidance by plaintiff-appellant of the Supplemental Contract; rather, he operated under it from November 10, 1960, until he had received all of the contract benefits.

It is respectfully submitted that as a matter of law the lower court was correct in its decision. The supplemental agreement was supported by adequate consideration, the plaintiff received the benefits of the agreement and had not at any time voided the Supplemental Agreement. Thus, the architect was and is estopped to deny its validity, having elected to affirm and work under it. The lower court was justified in affirming the agreement as a full accord and satisfaction and ruling as a matter of law that it was not obtained under facts and circumstances which would render it void. Therefore, the Items No. 1 and No. 2 of plaintiff-appellant architect's claim as a matter of law are not subject of litigation and were properly dismissed by the lower court.

If further discussion of this point is necessary, it is to be noted that coercion is a specie of fraud and the 3 year statute of limitation for fraud had long run before suit was filed. *Price v. The Estate of Havereleigh*, 428 S.W.2d 422; *Leeper v. Beltrami*, 347 P.2d 12 (Calif. 1959); 77 ALR2d 803; Section 78-12-26(3) *Utah Code Ann.*, 1953. Also, fraud must be specifically plead, but the architect did not even allege this

claim in its amended complaint. (R. 23-26). The assertion must fall as a matter of law.

POINT III

ITEM NO. 6 CLAIMED BY THE PLAINTIFF-APPELLANT ARCHITECT WHICH THE UNDISPUTED FACTS SHOW ARE NOT PART OF A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The undisputed facts show that Item No. 6 is a claim for \$1,250.00 for non-architectural time allegedly expended by Harold K. Beecher in assembling documents for the civil litigation in the case of *Clayton v. Salt Lake City and Salt Lake County*, 15 U.2d 5, 387 P.2d 93. These facts further show that the total time expended by Mr. Beecher, at the request of either of the parties-defendant, was an afternoon in preparation of an affidavit for summary judgment for the District Court. Further, the litigation was a case in which the plaintiff-appellant architect had an interest equal with the city in that by successful defense, he received an additional fee of \$5,532.10 based on his 10% percentage fee of the contract cost.

The time claimed by plaintiff-appellant for Mr. Beecher's attendance at various court hearings was purely voluntary as he was neither requested to attend nor needed to be in attendance. See Statement of Fact No. 8F, *supra* at p. 10. Time spent at depositions by Mr. Beecher was required by the plaintiff in that

case not the city or the county. Mr. Beecher was subpoenaed by said plaintiff and received his statutory fee. (R. 225; 231). Certainly, the city and county are not additionally responsible to pay for his time in attendance.

Importantly, the contracts subject of the within litigation have no provisions which provide for the compensation of the architect for non-architectural services, such as court appearances. Statement of Facts, Nos. 2 and 5, supra at pages 3 and 5. The plaintiff's complaint did not allege that he is entitled to compensation by virtue of quantum meruit or some other implicit agreement whereunder the city or the county agreed to pay for Mr. Beecher providing the affidavit. Plaintiff-appellant had an equal interest in that suit with the Defendants and no agreement by the city or county was made to pay the architect for attending court hearings to satisfy his own ~~curiosity~~ ^{curiosity}. 1

There was no benefit received by the defendants-respondents by the attendance at the court hearings by Mr. Beecher. Certainly, the plaintiff-appellant architect having entered pre-trial conference had a duty to render to the court at least a proffer of proof to support its claim on these issues. It failed to meet this burden and the court properly dismissed these claims.

POINT IV

ALL CLAIMS OF THE PLAINTIFF-APPELLANT ARCHITECT ARE NOT RECOVERABLE FOR FAILURE TO FILE A TIME-

LY CLAIM AS REQUIRED BY THE PROVISIONS OF 10-7-77 AND SECTION 63-30-1 ET SEQ., UTAH CODE ANN. 1953. FURTHER, THE ENTIRE CLAIM OF THE PLAINTIFF-APPELLANT ARCHITECT IS BARRED BY ITS FAILURE TO FILE SUIT WITHIN ONE YEAR AFTER THE DENIAL OF ITS CLAIM AS PROVIDED BY UTAH LAW.

The undisputed facts show that the claims of the plaintiff-appellant are based on work done and completed on the dates as hereinafter stated; to-wit:

CLAIM SUBJECT	DATE WORK COMPLETED AND/OR CLAIM ACCRUED
Item No. 1— Alleged attendance at sundry meetings of the Citizens Advisory Committee.	May 11, 1960 Findings of Facts No. 8A Supra at p. 7.
Item No. 2— Alleged direct and indirect expenses in connection with preliminary drawings, outline specification and cost estimates for “high rise” building.	October 6, 1960 Statement of Facts No. 8A Supra at p. 7.
Item No. 3— Not subject of this appeal.	
Item No. 4— Claim for expenses caused by delay in construction completion.	Construction lasted from June 19, 1963 through March 21, 1968. Statement of Facts No. 8D Supra at p. 9.

tem No. 5—

Not subject of this appeal.

tem No. 6—

Time in preparation and assistance in <i>Clayton v. Salt Lake City and Salt Lake County.</i>	December 2, 1963, Statement of Facts No. 8F Supra at p. 10.
---	---

tem No. 7—

Alleged preparation of space analysis survey.	February 1, 1961, Statement of Facts No. 8G Supra at p. 11.
--	---

Item No. 8—

Alleged preparation of square foot drawings and computations for space study.	October 6, ¹⁹⁶⁶ 1967 , Statement of Facts No. 8H Supra at p. 12.
---	--

Prior to the passage of the Governmental Im-
munity Act in 1965, Utah law clearly provided that
every claim against a city or town had to be presented
within one year after the last item of such account or
claim accrued. The then applicable law stated:

“Every claim, other than the claims above
mentioned (those dealing with defective, unsafe
or dangerous streets or bridges), against any
city or town *must be presented*, properly item-
ized or described and verified as to correctness
by the claimant or his agent, *to the governing
body within one year after the last item of such
account or claim accrued, . . .*” 10-7-77, *Utah
Code Ann.* 1953 (Emphasis added); cf. 10-7-77,
as amended in 1973.

The law further clearly provided:

“It shall be a sufficient bar and answer to any action or proceeding against a city or town in any court for the collection of any claim mentioned in Section 10-7-77, that such claim had not been presented to the governing body of such city or town in the manner and within the time specified in Section 10-7-77; . . .” 10-7-78, *Utah Code Ann.* 1953.

It is undisputed that no claim was filed with the city with regard to any of the matters subject of the within litigation prior to January 28, 1969. See Statement of Fact No. 8, *supra* at p. 6. With the exception of Item No. 4 and No. 8, it is apparent from the undisputed facts that no claim was filed within that one year period; therefore, the other claims individually are barred. Claims No. 4 and No. 8 are discussed hereafter, but the lower court's decision on the others should be affirmed by this court for this reason alone.

In addition and supportive of a conclusion that all claims are barred, is the fact that in 1965 the Utah Legislature passed the Governmental Immunity Act, which required that a claim be filed with the political subdivision of the state within ninety days after the “cause of action” arose. The law states:

“A claim against a political subdivision shall be forever barred unless notice thereof is filed within ninety days after the cause of action arises; provided, however, that any claim filed against a city or incorporated town under Section 63-30-8 (concerning defective, unsafe or dangerous conditions of highways, bridges or

structures) shall be governed by the provisions, of Section 10-7-77, *Utah Code Annotated* 1953," 63-30-13 *Utah Code Ann.* 1953." (Emphasis added)

Therefore, any claim which matured to be a cause of action after 1965 had to be filed as a claim with the city or county within ninety days. Clearly, on the undisputed facts, any claim allegedly maturing to be a "cause of action" after 1965 was not timely filed in that the latest date for filing would have been June 22, 1968. This fact is true because that date is 90 days subsequent to the date of completion of the construction contract. See Item No. 4, *supra* at p. 5. The plaintiff-appellant's claim was not filed until January 28, 1969.

In addition, the Governmental Immunity Act provides that claims, once filed, shall be deemed denied if the governmental body does not respond within ninety days. The law clearly states:

"A claim shall be deemed to have been denied if at the end of the ninety-day period the government entity or its insurance carrier has failed to approve or deny the claim." 63-30-14, *Utah Code Ann.* 1953.

Thereafter, the claimant must file an action within one year or the action is barred. The law on this point states:

"Said action must be commenced within one year after denial or the denial period as specified herein." 63-30-13, *Utah Code Ann.* 1953.

The undisputed facts show that the first claim made by the plaintiff-appellant architect was dated January 22, 1969 and was not submitted to the City or County Commissions prior to January 28, 1969. See ~~Findings~~ ^{Findings} of Fact No. 8, supra at p. 6. Therefore, that claim would have been deemed denied under the provisions of the Governmental Immunity Act as of April 29, 1969; thereafter, the plaintiff would have been obligated to file a suit on or before April 28, ~~1970~~ ¹⁹⁷⁰. However, the suit was not filed until April of 1971, ~~one~~ ^{one} year late.

Admittedly, there is some room for discussion regarding the date of denial in that a formal written denial was entered under date of February 9, 1970. See Statement of Fact No. 11, supra at p. 13. However, even using that date, the plaintiff-appellant would have been obligated to file suit prior to February 10, 1971, which he did not do. Thus, regardless if one uses the implied denial or the written denial, the plaintiff failed to file timely litigation as required by the Governmental Immunity Act. As such, in addition to the fatal defect of failing to timely file a claim, the claims are barred as a matter of law.

The plaintiff-appellant architect's only defense to these clear statutory provisions appear to be: (a) Its assertion that the Governmental Immunity Act provisions dealing with filing claims do not apply to contract actions (R-25); and (b) That the city and county are estopped from asserting the claim in that

suit was not filed within a year after the denial of the claim. (R-26).

With reference to its first assertion, there is no factual dispute that, excepting only claim Item No. 4, plaintiff-appellant architect failed to meet the applicable provisions of 10-7-77, *Utah Code Ann.* See discussion supra at p. 36. Thus, even if the architect's argument is accepted arguendo, Section 10-7-77 remains. Therefore, the Governmental Immunity Act found in Title 63 is not even needed to defeat those claims.

However, the Governmental Immunity Act by its own terms affirmatively states that it applies to contractual obligations; it provides:

“Immunity from suit for all governmental entities is waived as to *any contractual obligation.*” 63-30-5, *Utah Code Ann.* 1953. (Emphasis added)

Further, the Act defines “claim” as follows:

“The word ‘claim’ shall mean *any claim* brought against a governmental entity or its employees as permitted by this act;” 63-30-2(5), *Utah Code Ann.* 1953. (Emphasis added)

Thus, the word “claim” as used in Sections 63-30-13, 14 and 15, which impose time limitations for filing claims and suit by definition applies to all matters covered by the Governmental Immunity Act, including contract obligations. If the plaintiff-appellant architect's contra position were correct and the legislature

intended the Governmental Immunity Act only to apply to torts, it would have used the word "injury" instead of "claim" in those sections, because that word is defined to be essentially tort actions. See 63-30-2 (6), *Utah Code Ann.* 1953; cf. 63-30-2(5), *Utah Code Ann.* 1953. The naked assertion of the plaintiff-appellant, unsupported by any authority, is not well taken and the lower court's decision should be affirmed.

The second assertion relating to estoppel, at the date of the pre-trial conference constituted a naked assertion that plaintiff-appellant was misled by the negotiating for arbitration and, thus, delayed in filing timely suit. This position was never reduced to sworn affidavit form. Contrarywise, Mr. Jack Crellin under oath denied that he had engaged in discussions or negotiations concerning arbitration. His denial of February 9, 1970 was deemed by him to be final. (R-176). Salt Lake County by written decision advised the county that arbitration was not a legal requirement and referred to Mr. Crellin's opinion for a denial. (R-73-75). Both city and county commissions responded to the plaintiff-appellant's second petition requesting this arbitration with a denial. (R-76, 77). Thus, the matters of record at the pre-trial hearing affirmatively indicate that there were no facts and circumstances to justify an estoppel theory.

Further, it is important to note that under Rule 16 concerning pre-trial conference requested by the plaintiff-appellant, he is under an obligation to at least make a proffer of proof sufficient to indicate a prima

facie case for trial. This obligation plaintiff-appellant failed to meet. Therefore, it is respectfully submitted that the lower court was justified in its dismissal.

However, even accepting *arguendo* the architect's position, it has stated no reason or justification why the claim dated January 22, 1969 was not timely filed. He has not alleged nor asserted that his delay was by any act on the part of the defendants-respondents to raise an estoppel theory. Rather, the estoppel question goes solely to the filing of suit date in April 1971. Therefore, in any event, the architect's claims must fail for failure to file a timely claim.

In addition, if no other theory is appropriate, certainly laches should bar these individual claims. Plaintiff-appellant architect received in excess of \$630,000.00 on this project for services rendered and did so without once advising defendant-respondent that he was seeking additional compensation. It received all of the benefits and gave no notice for over eight years. The plaintiff-appellant architect failed to advise the defendants concerning its claims until the latter part of January 1969, even though most of these were completed well before October 6, 1966.

It is respectfully submitted that the lower court's decision dismissing all counts at the preliminary hearing is correct and proper. This court should likewise affirm the lower court's decision for the above stated reasons.

SUMMARY

The suit by the plaintiff-appellant architect seeks an additional \$130,000.00 on eight separate claims for work allegedly done relating to the construction of the Metropolitan Hall of Justice, in addition to the over \$630,000.00 it has already received. The individual claims No. 1 and No. 2, totalling \$6,750.00 and \$20,981.30 respectively are clearly barred by accord and satisfaction agreements dated November 10, 1960 and December 30, 1960, and by the architect's failure to give any notice of objection to that agreement until more than eight years after its execution and years after receiving the benefits from the agreement.

Not only as a matter of law is the plaintiff estopped from challenging the validity of that accord and satisfaction agreement, this action on these counts is barred by the statute of limitations and the fact that ~~it~~^{it} failed to file a timely claim within one year after those claims accrued as required by law. Further, it failed to file a suit within one year after the denial of the claims by the defendants-respondents as required by law.

Claims No. 3 and No. 5 were dismissed by stipulation and are not part of the within litigation.

Claim No. 4 demanding \$95,893.15 for alleged extra expenses because of delay in the construction is barred as a matter of law by virtue of the clear, unambiguous integration of the parties understanding. This written contract gave the plaintiff-appellant

architect, six percent (6%) of the construction cost as an architectural fee. No time limit in the contract was specified for the completion of this project; rather, the contract clearly contemplated the possibility of an extended construction period. In recognition of this fact, it granted to the architect additional compensation for inspection expenses over \$15,000.00, if the construction were so delayed. Parol evidence is not appropriate as suggested by plaintiff under these circumstances and the lower court so properly ruled.

However, claim No. 4 is also properly dismissed on the grounds that the claim was not timely filed as required by Utah law and that suit regarding that claim was not filed within one year of the claim's denial as required by law.

Claim No. 6 is a claim of \$1,250.00 allegedly for services in preparation of a law suit. Such preparation and attendance at various court hearings was not subject of the contract extra work clause, which provided only for services for "extra drafting and other expenses due to the changes ordered by the owner or due to the delinquency or insolvency of the owner or contractor, or as a result of damage by fire." A few hours of time was used by the city attorney in discussing with Mr. Beecher an affidavit in which it had a vested interest by virtue of a contract giving it 10% of the purchase contract. In fact, by successful prosecution by the city attorney's office, plaintiff-appellant received over \$5,500.00 of additional compensation. The other time expended was solely for his own benefit and

curiosity and was not ordered by and was of no benefit to the city or county. The complaint failed to state a claim to grant the relief prayed; further, no claim or suit was timely filed regarding it.

Claims No. 6 and No. 7 demand \$4,000.00 for space analysis surveys and square foot drawings and computations. The lower court properly dismissed these claims in that the facts clearly show most of the work related thereto was covered by the accord and satisfaction agreement of November 10 and December 30, 1969. Further, they are clearly barred by the failure to file a claim with the city or county for a period exceeding two years and three months from the date that the claim accrued or arose. They are further barred by failure of the plaintiff-appellant architect to file suit for more than one year after the claims were denied as required by Utah law.

Conflict in controversy has now existed between these parties for a period approaching fifteen years on the matters subject of this appeal. After approximately two years of trial preparation, after requesting a pre-trial conference, and after the plaintiff-appellant had certified to the court that it was prepared to go to trial, the architect could not factually present a prima facie case to justify a trial. It is respectfully submitted that the provision of Rule 16 of the Utah Rules of Civil Procedure concerning pre-trial conferences the court was not only justified but required to give the plaintiff-appellant the relief of a judgment of dismissal.

It is respectfully submitted that this court should affirm the lower court's decision and finally inter the carcass of this fifteen year old dispute. Each claim is barred by applicable statutes of limitations and suffers from multiple other fatal defects.

RESPECTFULLY SUBMITTED,

ROGER F. CUTLER

Attorney for Defendant-Respondent
Salt Lake City Corporation
101 City & County Building
Salt Lake City, Utah 84111

RICHARD S. SHEPHERD

Attorney for Defendant-Respondent
Salt Lake County
C-220 Metropolitan Hall of Justice
Salt Lake City, Utah 84111

**RECEIVED
LAW LIBRARY**

DEC 6 1975

**BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School**