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Harold K. Beecher v. Salt Lake City Corporation : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD K. BEECHER AND ASSOCIATES,
Plaintiff-Appellant,
vs.
SALT LAKE CITY CORP. AND SALT LAKE COUNTY,
Defendants-Respondents.

Case No. 13610

APPELLANT'S REPLY BRIEF

Appeal from Summary Judgment of Dismissal
by District Court of Salt Lake County, Utah,
Honorable D. Frank Wilkins, *Judge*

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STATEMENT OF THE CASE

Suit by architect Beecher for additional fees claimed to be owed for extra architectural services and expenses for Metropolitan Hall of Justice complex resulting from (a) change by Defendants to spread-out type structure after architect Beecher had worked for 10 months on a high-rise concept, and (b) increase of 2½ times in construction time resulting from later decision of Defendants to build project in two phases rather than as a single project.

DISPOSITION IN LOWER COURT

The case was scheduled for trial January 12, 1973, (R. 211), was re-scheduled for February 22, 1973, (R. 235), was pre-tried February 22, 1973, at which time the Court indicated that the case would be tried within a

week or two, and scheduled a trial date for March 7, 1973, (R. 309). A further pre-trial conference was held March 5, 1973, not reported — R. 309). No further hearings occurred (although requested by Beecher) until immediately before Judge Wilkins resigned as a judge when Judge Wilkins granted summary judgment dismissing Plaintiff's claims, although no motion for summary judgment was filed. A transcript of the pre-trial hearings held 10 months earlier was not available at the time that summary judgment was ordered.

RELIEF SOUGHT ON APPEAL

Reversal of summary judgment of dismissal and remand for trial.

STATEMENT OF FACTS

Plaintiff Beecher incorporates by reference the statement of facts contained in it's original brief herein (P. 2-5).

The statement of facts contained in Defendants' brief includes considerable argument, and is inaccurate in many particulars, however since their statement of alleged facts is 13 pages long, much of which is immaterial to the issues involved in this appeal, Plaintiff Beecher will not attempt a detailed answer thereto, except to the extent that they are answered in responding to individual points raised by Defendants. However, a few general comments may be helpful to understand the basic problems.

Defendants indicate (pages 3 and 4 of Defendants' brief) that since the Defendants changed their minds

as to the type of structure that they desired (after architect Beecher had worked for 10 months under the the direction of Defendants' agent designing a high-rise building) that they could simply refuse to approve that work and avoid payment. The contract expressly requires payment by Defendants for abandoned work. (See discussion on page 4 of Plaintiff's original brief and R. 29, Par. #4).

Defendants' incorrectly claim (Pages 4 and 5 of brief) they somehow had a right to terminate Beecher's contract simply because they decided to abandon the high-rise concept. The only breach of contract was by Defendants, not Beecher. Defendants seek to take advantage of their own wrong in refusing to approve the work done by Beeecher and to thereby escape payment for that work.

Defendants' also incorrectly claim (Pages 4, 8 and 9) that the supplemental agreement (R. 34, 35, 45, 46) of November 10, 1960, constitutes a waiver of Beecher's right to be paid for extra work done thereafter by Beecher. No such waiver can be found or inferred from that supplemental agreement. See discussion on page 10 of Beecher's original brief. The supplemental agreement simply approved early payment of a part of Beecher's architect fee, waived the contractural provision requiring prior approval of Defendants before payment for architectual work (since the high-rise concept was being abandoned and would not be approved). See discussion on pages 9-10 of Beecher's original brief.

Defendants' also apparently fail to realize that the

contract for architectual services was made well before the work started on the high-rise building concept (early 1960); that the supplemental agreement was made when the decision was made to abandon the high-rise concept (Nov. 1960); that the construction contract was not made until the building design had been completed (work commenced about June, 1963 — R. 64-68). The fact that the building construction proceeded according to schedule is not inconsistent with Plaintiff's claim that a construction period of two years was contemplated when the original and supplemental contracts were executed, since the decision to build a two-phase project was made after those contracts were signed and before the construction contract was executed. The construction contract expressly provided for a two-phase construction project. Since the decision to complete the police facilities prior to commencing construction on the courts building (two-phase construction decision) was made well after execution of the supplemental agreement, that agreement could not constitute a waiver of Plaintiff's claims for extra work resulting from the decision to construct the project in two phases, which decision caused the construction period to take 2½ times the time contemplated when the architectual contracts were entered into.

POINT I

PLAINTIFF IS CONTRACTUALLY ENTITLED TO EXTRA COMPENSATION RESULTING FROM EXTENDED CONSTRUCTION PERIOD

Defendants' point I asserts that since no specific time is fixed in the contract within which the architec-

tural work is to be completed, that as a matter of law Plaintiff is not entitled to extra compensation by reason of extending construction period 2½ times the period originally contemplated. In support of that proposition counsel for Defendants cite *Osterling v. First National Bank,* 105 A. 633 (Pa. 1918); 5 Am. Jur. 2d Architects, Sec. 14 at P. 676, and *McDonald Brothers v. Whitney County Court,* 8 Ky. L. Rep. 874 (1887), 20 ALR 1356. Those cases do not support Defendants' position. In the *Osterling* case the court expressly held that since the cost of the project was doubled by the extra work, and the architect's fee was increased proportionately, that the architect was adequately compensated for his extra work, and in that case the court pointed out that the contract made no provision for extra compensation under those circumstances. Our case differs from the Osterling case since the cost of the project was not increased as a result of the change from a high-rise to the present design, so Beecher has not been compensated by increased fees from the change; also our contract expressly provides that defendants will pay extra compensation to Beecher for extra services and expenses:

> "EXTRA SERVICES AND SPECIAL CASES. If the Architect is caused extra drafting or other expenses due to changes ordered by the Owner, . . . *he shall be equitably paid for such extra expense and the service involved . . .*" (R. 29, 4)

See also Beecher original brief P. 3 and 13.

In the *McDonald Brothers v. Whitney, supra* case relied upon by Defendants provision had been made for

payment of extra compensation to the architect in the event of delay, by deducting that compensation from the amounts due to the contractor. The court in that case also simply found that the owner was not contractually obligated to pay extra compensation to the architect by reason of an extended construction period. Both cases support the claim of Beecher. A careful reading of both cases indicates that had the architect's contract contained a provision for payment by owner for extra work (such as is contained in the contract between Beecher and Defendants) that the owners would probably have been held liable for the extra compensation sought.

An architectural contract is no different from any other contract, and it should be construed according to the usual rules of construction and evidence. Issues of fact remain for trial as to whether or not:

(a) The supplemental contract constitutes a waiver by Beecher of the right to be paid for extra work resulting from the later decision to build the project in two phases and to thereby increase the construction period from the contemplated 2 year period to 4¾ years. If Defendants deny that the decision to change to a two-phase construction was made after execution of the supplemental agreement, then an issue of fact remains for trial concerning that issue.

(b) Contrary to the assertions by Defendants, no claim is made for work done prior to the supplemental agreement (Nov. 1960). One claim asserted by Beecher (item #2 — see P. 4 of Beecher's original brief) is a

claim for the cost of preparing new drawings (after the agreement of Nov. 1960) to replace the abandoned plans. Counsel for Defendants was apparently confused into believing that a claim is asserted for work done prior to the November 1960 agreement by the fact that some costs incurred prior to that date were used in estimating the cost of preparing the new plans. An issue of fact remains for trial as to whether or not the supplemental agreement precludes Beecher from claiming compensation for redesigning and redrafting the abandoned plans. See discussion on pages 9-13 and 16-17 of Beecher's original brief.

(c) See also other issues of fact remaining for trial and discussion on pages 15-18 of Beecher's original brief herein.

Defendants' assertions that Becher was paid a "generous" fee for his work (P. 17 of Defendants' brief); that Beecher received extra compensation for extra work orders (P. 20 & 22) and received some extra payment to reimburse Beecher for extra compensation to one on-site inspector (P. 18, 19 & 22) are wholly immaterial to the issues involved in Beecher's claim for extra compensation for other services, costs and expenses which Beecher claims to be entitled to be paid under the terms of the contract. Reference to those items appears to be an emotional plea which in essence says that the architectural fees are already high enough so Defendants should ignore the contract and simply refuse to pay more. Counsel for defendants is not in a position to determine the adequacy of the compensation to be paid to Beecher for the architectural work. Defendants and

Beecher made that determination when they drafted and signed the contracts for architectural work, and the only issue now before the court is a determination of the amounts owed to Beecher for those services.

The statement made on page 17 of Defendants' brief purporting to restate the terms of the contract between Beecher and Defendants concerning circumstances where Beecher was to be paid extra compensation are incorrect and misleading. Defendants state therein that ". . . extra compensation was agreed to be paid if: (a) Changes were made *in approved drawing*, (b) . . . (c) Expenses were incurred because work designed or specified on the *approved project* was abandoned or suspended. Nothing whatever is said in paragraph #4 of the contract between the parties which limits the right of Beecher to be paid for changes to *"approved drawings"* or to work abandoned on an *"approved project."* Defendants then go on to argue that since they did not approve the abandoned drawings that they were under no obligation to pay for them, and by implication that since the final drawings were not approved until after the decision to build the project in two phases had been made that Beecher should not be paid for these claims since they were not "approved." If we were to follow that reasoning to it's logical conclusion we would necessarily conclude that no rights were vested in Beecher by the contract unless the Defendants decided to give him those rights by "approving" matters covered by the contract. Such reasoning falls by it's own weight.

The contract between the parties appointed the Salt

Lake City Engineer as Defendants' representative and required that Beecher ". . . perform and conduct all required services under his direction and supervision . . ." (R. 32, Par. 13). The City Engineer worked with Beecher for 10 months designing a high-rise project (R. 286), which constituted acceptance by the Defendants of the work being done. Defandants' claim that their respective commissions had not "accepted" the work is unacceptable. Factual issues concerning waiver, estoppel, etc. remain for trial concerning these issues.

POINT II

NOVEMBER 1960 AGREEMENT DOES NOT BAR BEECHER'S CLAIMS

Beecher's discussion concerning the terms and effect of the original agreements are set forth on pages 9-13 and 16-18 of Beecher's original brief and will not be repeated here. That discussion adequately demonstrates that issues of fact remain for trial concerning the effect and applicability of that agreement to Beecher's various claims. However, a few of the factual statements recited under point II in Defendants' brief require further comment.

Defendants claim that they decided to not approve the high-rise work done by Beecher "after seeing the preliminary work" (Defendants' brief P. 25). This is simply untrue since Defendants representative was working daily with Beecher in designing that work, and since the Defendants simply changed their mind as to the type of structure desired after Beecher had pro-

ceeded in good faith for 10 months. Defendants should pay for their change of mind, not Beecher. The only reason that the Defendants claim that the work was "unsatisfactory" (defendant brief P. 26) is because they changed their minds, not because there was anything wrong with the work.

Defendants again assert (P. 26) that they had no obligation to pay for the abandoned drawings because that work was "unapproved." The contract with Beecher expressly requires Defendants to pay for abandoned work (R. 29, Par. 4). Defendants would have the Court believe that the abandoned drawings were "unacceptable" because of some default or misconduct by Beecher, when in fact Defendants' representative had approved all work on those drawings as they progressed and the only reason for abandoning those drawings was because Defendants decided not to build a high-rise building.

In point I, sub-paragraph 2 (page 6-7) of Plaintiff's original brief it is pointed out that items #7 and 8 of Plaintiff's claim for extra compensation (R. 53-54, 69 & page 5 of brief) are not disputed, that this work was extra work not included in the architects contract, and that the Defendants had acknowledge liability for those claims (R. 89-90, Par. 7 & 8), but that the court had overlooked this admission of liability and had improperly dismissed those claims. In response Defendants point out that these services were performed prior to October 7, 1966, (Pages 12-13 of Defendants' brief), apparently thereby inferring that they should be barred

as having been performed prior to the date of the supplemental agreement of November 10, 1960, (R. 34-37). Obviously a 1960 agreement could not bar a claim for extra work performed in 1966. Either Plaintiff is entitled to judgment against Defendants for items #7 and 8 of their claim (P. 5 of Plaintiff's brief), or an issue of fact remains for trial as to whether or not the work included in those claims is extra work not required by the contract.

Questions of waiver, estoppel, etc. raised by counsel for Defendants in their brief (p. 27-28) are clearly issues of fact which require a trial. Defendants' motion is not supported by affidavits, etc., so there are no established facts to support those claims, and summary judgment under those facts to support those claims, and summary judgment under those circumstances is improper.

POINT III

ISSUES OF FACT REMAIN FOR TRIAL ON ITEM NO. 6

Defendants' brief asserts that the taxpayers suit did not involve architectural services and accordingly that Beecher is not entitled to pay under his contract. The lawsuit involved the design of the jail, the adequacy of the jail equipment bid, and obviously did involve primarily architectural services. The record is devoid of any affidavit or other established and uncontested facts which refute Beecher's claim. Beecher's verified claim (R. 53) creates an issue of fact for trial and precludes summary judgment on this item.

POINT IV

ISSUES OF FACT REMAIN FOR TRIAL CONCERNING THE TIMELINESS OF FILING OF CLAIMS AND OF LAWSUIT. QUESTION OF TIMELINESS IS ALSO NOT BEFORE THE COURT

The district court dismissed only a part of Plaintiff's claims, leaving items #3 and 5 of Plaintiff's claim for trial (R. 248, 250). All claims filed by Plaintiff were included in a single instrument filed with the Defendants (R. 47-59) and a single lawsuit. If the district court had determined that Plaintiff's claims or lawsuit were untimely the entire lawsuit would have been dismissed. Reserving of some claims for trial constitutes an unequivocal holding by the district court that the claims and lawsuits were filed on a timely basis, or that issues of fact remained for trial concerning the timeliness of those claims and of this lawsuit. Defendants did not file a cross-appeal as permitted by Rule 74(b), URCP, and cannot now appeal to this court from the clear decision of the district court denying their defenses concerning timeliness. The Court simply has no jurisdiction to entertain Defendants' claims concerning timeliness since they failed to file an appeal to this Court within the time required by law. The filing of a timely appeal is jurisdictional. *Ratliff, Estate of v. Conrad,* 19 U. (2d) 346, 431 P. 2d 571.

Defendants argue that the services of Beecher were completed at an earlier date and that the claim was not filed on a timely basis (P. 13-14 P. 34-38), however, Defendants admit that they wrote a letter terminating the

services of Beecher April 22, 1970, (Exhibit "VII" to Plaintiff's complaint, R. 71). The only purpose of such a letter would be to terminate employment then existing. Had it been terminated earlier no such letter would have been necessary. If Defendants desire to now impeach their own letter an issue of fact remains for trial concerning the date upon which the services were completed or terminated.

Defendants further argue that the lawsuit was not filed within a year after denial of the claim (P. 38-41). The record shows to the contrary. Exhibits "IX" (R. 73) and "X" (R. 74) to Plaintiff's complaint are letters from the Defendants denying Plaintiff's claim May 21, 1970, and July 15, 1970. This lawsuit was filed April 2, 1971, (R. 1), well within one year after the denial of Plaintiff's claim. Defendants' assertions that the claims were denied as a matter of law at an earlier date raise issues of fact which require a trial in view of Defendants letters of denial (R. 73 & 74), including questions of waiver, estoppel, etc.

The record does not disclose the filing of a motion for summary judgment, but simply that the Court heard the pre-trial on February 22, 1973, at which time it was continued to March 5, 1973, (R. 246), and that further pre-trial was held March 5, 1973, at which time the minute entry recites that "The Court takes the issues under advisement." Counsel for Defendants filed memorandum of authorities on questions of whether Plaintiff's complaint stated a claim upon which relief could be granted (R. 251-254) and on questions of lack of consideration and economic compulsion and duress (R. 255-258). No memorandum was filed with the district court

concerning the questions timeliness now attempted to be raised for the first time on appeal, and that question was not discussed on the record at the pre-trial hearing (R. 283-310). The minute entry (R. 248) and order granting summary judgment (R. 249-250) do not mention the new issues concerning the timeliness of the claims or lawsuit. Defendants cannot raise the issue of timeliness for the first time on appeal. *Dolores Uranium Corp. v. Jones,* 382 P. 2d 883, 14 U. 2d) 280.

CONCLUSION

The Court is referred to the summary in it's original brief (P. 15-18) where issues of fact requiring trial are discussed. This reply brief is filed in order to respond to new issues raised and to clarify statements contained in the Defendants' brief.

No motion for summary judgment appears in the record or in the transcript of the pre-trial hearing. The minute entry reflects that the Court took the issues under advisement. (R. 247) Ten months later, and immediately before Judge Wilkins resigned, Judge Wilkins granted summary judgment. (R. 248). It appears that the delay in ruling, together with the press of trying to clear the Court's calendar, may have resulted in an incomplete consideration of the issues and an improper summary judgment. Issues of fact remain for trial which preclude granting of summary judgment.

Respectfully submitted,

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