1978

Bills' Roofing, Inc. v. Salt Lake City School District : Reply Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF UTAH

BILLS' ROOFING INC., Plaintiff-Respondent,	)	
vs.	)	Case No. 15346
SALT LAKE CITY SCHOOL DISTRICT, Defendant-Appellant.	)	

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court of Salt Lake County,
Honorable Ernest F. Baldwin, Jr., Judge

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ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO RULE AS A MATTER OF LAW THAT PLAINTIFF BREACHED ITS CONTRACT WITH DEFENDANT.

A. Reasons for Termination of Plaintiff.

Plaintiff complains, in an effort to distract the Court from the real issues, that it was not aware that the Salt Lake Board would claim a violation of the roofing contract until the trial had begun. (Respondent's Brief, p. 6). This statement is incorrect since the answer claimed failure to work in a "professional, workmanlike and expeditious manner" and admissions sent to Plaintiff clearly asked it to admit or deny

the existence of the protection and sealing requirement in the contract and its failure to properly perform it. (R., p. 37). Plaintiffs are trying to disguise the real change in position.

In response to the request for admissions Plaintiff plead that the original contract had been orally modified. (R., p. 40). Likewise, the plaintiff up to the second day of trial argued that the contract had been modified by the alleged statements of the school district employees. (Tr., pp. 155-159). There can be no doubt, therefore, that Plaintiff was well aware that Paragraph 11 in the contract was one ground which Defendant relied upon in dismissing Plaintiff from the roofing project.

Plaintiff has characterized its dismissal from the project as caused solely from the failure to seal the roof. This is also incorrect. Throughout the trial the Salt Lake City School District argued that it was entitled to terminate Plaintiff from the project because of the company's failure to properly protect the building from water damage and from its continuous subsequent delays in both failing to prevent further damage and in failing to complete the work. Exhibits 16P and 19P demonstrate the concern the district had as to the plaintiff's performance and testimony further demonstrated this.

Exhibit 16P is a letter dated October 30, 1974 to Plaintiff roofing corporation from Bruce F. Ririe, Director of

ings and Grounds for the Salt Lake City School District. This letter in pertinent part said the following:

> There was a serious roof leak on the above project over the weekend of October 19-21, 1974. This was caused when the crews removed the old roof and did not get a new one back on before the storm. The roof has continued leaking and causing further damage with every subsequent storm during the last two weeks. As of this date our crews have had to work a total of 31 hours overtime.. . .We would encourage you to move as rapidly as possible to complete your contract. The longer the roof is left open the more damage will result. So far it has not disrupted the school program but if we get a heavy storm it very well could. The damage cost could then become substantial.

Exhibit 19, a letter to Plaintiff roofing company by Mr. Ririe dated November 5 summarizes the reasons for the termination of Plaintiff from the roofing job. This letter in pertinent part states the following:

* * *

> Your crew started work the last part of September and completed approximately 4,000 square feet of reroofing. They then started on the main building and had part of the old roof removed when it rained over the weekend of October 20. You attempted to cover over the roof with visqueen but this was not successful and water damage resulted in the building. It was necessary to work our crews overtime to handle this emergency. The cost of this damage is now approaching an estimate of $2,000 including the labor charges accrued.
>
> You assured us that you would immediately get the new roof on as soon as the rain stopped. In fact, you quoted us the date of Saturday, November 2, 1974 and you intended to bring in a large crew and complete the work. You later

assured us this would happen on Monday, November 4, 1974 for certain.

In actual fact, what has happened is that no one showed up to work November 2 and on November 4, your crews came and removed their equipment stating the roof was too wet to work on and they were going to another job. An examination of the roof showed it to be dry except for one or two spots that could easily be dried out with a torch.

We are very disappointed in your performance of this project. You were slow getting on the job and have only worked sporadically since. You have made no attempt to clean up the water inside the building or protect it. It has been necessary for our crews to do it all.

We have been unable to contact you by telephone on November 4 and 5. Therefore, we are sending you this registered letter to inform you that unless the new roof is installed where the old was torn off and the roof leaks caused by your crews repaired by Saturday, November 9, 1974 so there is no further water damage inside the building, your contract with us will be cancelled.. . .

If you do go ahead to complete this project we expect that any further work will be done in such a manner that there will be no further water damage to the building or its contents.

Thus, the defendant school district did not abruptly and recklessly terminate the plaintiff because of one incident involving a leaky roof. The sum total of the leaky roof, the delays in protecting it, the continuing disruption to the education process, the delays in completing the project, the inability to communicate with Plaintiff, and other factors resu

ted in the termination of the contract. As stated in Appellant's main brief, the Salt Lake District was not required to allow further damage to its building, further delay, and further unconventional methods of roofing to be utilized but had the right at that point to terminate Plaintiff and to pay it for its previous services. The fact that the district was partially paid for some of the damage incurred does not negate the right of the district to terminate Plaintiff from the job before payment and while damage was occurring daily.

B. Determination of Breach Does Not Involve Waiver Question.

Plaintiff argues that it was proper for the trial court to consider the issue of waiver before determining whether a breach had been committed. Plaintiff stated, "Thus, if the question of waiver is disputed, based on the evidence, that would a fortiori put the question of breach in dispute, since it would be disputed whether in fact at the time of the alleged breach there was even a clause to the contract to be breached." (Plaintiff's brief, p. 8).

This assumption is erroneous. The trial court specifically found that the parties had not orally modified the contract. Had an oral modification of the contract been present then Paragraph 11, requiring protection of the building, would have been eliminated from consideration. However, waiver is not the same as modification since waiver only excuses a breach.

5 Willston on Contracts, Section 676, pp. 219-222. In these circumstances modification must precede the breach while waiver can only be made subsequent to a breach.

Instruction No. 14, given to the jury (R., p. 100), stated this principle as follows:

> Under ordinary circumstances where there is an existing actual breach of contract of a character going to the essence, the innocent party will, if he insists on performance notwithstanding the breach, keep alive his own obligation to continue with performance, with the result that the party at fault, even though having in the interval done nothing in reliance on a continuance of performance, may, if he sees fit, turn about and hold the innocent party to performance. In other words, a party may waive a breach by the other party and then be liable for his own subsequent breach.

This instruction recognizes the general principle of law that waiver is a defense to a claim of breach of contract when the innocent party still seeks performance from the breaching party. Plaintiff in its brief even admits this when it states "Waiver is a defense raised to Defendant-Appellant's claim that Plaintiff-Respondent breached its contract." (Respondent's brief, p. 10). For these reasons Plaintiff's assertion that waiver was an integral part of breach is incorrect.

Analyzing this principle in terms of burden of proof clearly shows the procedure which should have been utilized. Plaintiff had the initial burden of showing that a contract was entered into with the school district and that it had been ter-

ted by the district. At that point a judgment could have been rendered against the district if it did not have a defense.

The district, in its case, had the burden of proving that the termination was excused because Plaintiff had breached its contract to perform work in a workmanlike manner and in accordance to the requirements of the contract. If the district could sustain its burden and show that an actual breach had occurred then judgment for the defendant could be made as a matter of law. In this case it was undisputed and conceded that the roof was not sealed, that the work was not done during the two-week interval of the rainstorms, and that the building was damaged as a result of the actions of Plaintiff.

Plaintiff at this point had to show that the district's excuse was itself excused. The party claiming a waiver has the burden of proof of the facts on which he relies to establish such waiver and unless such proof is forthcoming he cannot sustain his claim to it. 28 Am. Jur.2d, Estoppel and Waiver, §173, p. 861. It was thus incumbent upon the plaintiff in rebuttal to show that the agents had expressed, implied, or apparent authority to make a waiver and that the elements of waiver were present--thereby excusing any breach the district was claiming.

Unfortunately, the trial did not proceed in this orderly manner but testimony as to waiver, agency, breach, and damages was mingled throughout both the plaintiff's and defendant's ca-

ses. This confusion is seen most markedly in the outcome o the instructions to the jury, the special interrogatories, and the failure of the trial court to rule as a matter of

For these reasons, the trial court erred in not ruling matter of law that a breach of contract had occurred by the duct of Plaintiff and erred further in submitting this ques to the jury with incomplete and erroneous instructions.

POINT II

THE TRIAL COURT ERRONEOUSLY ALLOWED PLAINTIFF'S CLAIM OF WAIVER TO BE PRESENTED BEFORE THE JURY AND ERRONEOUSLY INSTRUCTED THE JURY.

A. There is a Substantial Difference Between Waiver a Modification.

Plaintiff claimed in its brief that it was under no obl gation to plead or give notice of the claimed waiver of Para graph 11. (Respondent's brief, pp. 9-10). Utah is a notice pleading state and the parties to a lawsuit are entitled to the theories of the adversary before entering the courtroom. That is especially true here where pre-trial discovery reque Plaintiff to disclose its legal theories; but Plaintiff, at suggestion of the Judge, changed its theory on the second da of trial.

Defendant's answer setting forth the affirmative defens that the work was not done according to the specifications a in a workmanlike manner clearly put Plaintiff upon notice t

this was the justification for the termination of the contract. At that point Plaintiff could have filed a reply to Defendant's answer, by leave court, under Rule 7, U.R.C.P. and thus raised waiver as a defense to Defendant's affirmative defense. Panson v. Pappas, 206 P. 261 (Utah 1922).

More importantly, it is evident that waiver was never contemplated by the plaintiff at any time until the second day of trial since in Plaintiff's response to Defendant's Requests for Admissions the following question and answer was given:

> 1. That the contract between the plaintiff and the defendant require that at the end of each working day the roof would be sealed to prevent water damage to the building and its contents.
>
> Response:
>
> Denied. The written contract was later modified by an oral contract between the parties. (R., p. 40).

Likewise, Plaintiff's counsel argued modification of the contract in the first portion of the trial but this theory was rejected by the trial court. (Tr., pp. 305-306). The concept of waiver was first presented by the Judge himself. (Tr., pp. 159-160).

The sudden emergence of the "waiver" theory midway through trial no doubt accounts to a large extent for the confusion that was present in the presentation of evidence and in the instructions to the jury. Neither side submitted jury instruc-

tions to the court containing these elements of agency or wa
ver.

There is obviously a world of difference between a modi-
fication of a contract and a waiver of terms in an existing
contract. In the first instance, the burden is upon the plai
tiff to show the creation of the modified contract and presu-
mably if the contract is thus shown the plaintiff will preva
The defendant, in such a case, can only argue that such a con-
tract was not made, and presumably will prevail if he can con-
vince the court or jury of the non-existence of the modificat

Waiver, on the other hand, involves a showing by the pla
tiff of the original contract, a claim by the defendant that
the original contract had been breached, and the response by
the plaintiff that the defendant waived any claim to assert
such a breach. The elements going to an oral modification of
a written contract are likewise completely different from the
elements necessary for a waiver of an existing contract--such
as the necessity for new consideration when modification is al
leged. Wood v. Brighton Mills, 297 F. 594, 600 (3rd Cir. 192

This Court in Phoenix Insurance Company v. Heath, 61 P.2
308 (Utah 1936) defined waiver as an intentional relinquish-
ment of known rights, and stated that to constitute a waiver
there must be an existing right, benefit or advantage, knowle
of existence thereof, and intention to relinquish it which i

distinctly made.

In order for a plaintiff to show a waiver of a contractual provision it is necessary to show an intentional relinquishment of a known right. Phoenix Insurance Company v. Heath, 61 P.2d 308 (Utah 1936); Bjark v. April Industries Inc., 547 P.2d 219 (Utah 1976).

It is crucial that knowledge and intention of the waiver be shown and proved by the party claiming it. The general rule is as follows:

> It must generally be shown by the party claiming a waiver that the person against whom the waiver is asserted had at the time knowledge, actual or constructive, of the existence of his rights or of all the material facts upon which they depended. No man can be bound by a waiver of his rights unless such waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights and intends to waive them must plainly appear. Ignorance of a material fact negatives waiver, and waiver cannot be established by a consent given under a mistake or misapprehension of facts. Waiver presupposes a full knowledge of an existing right or privilege and something done designedly or knowingly to relinquish it. 28 Am.Jur., Estoppel and Waiver, Section 158, p. 841; 17A C.J.S., Contracts, §492(1), p. 696.

It is also fundamental that a waiver of a right or privilege is not presumed from mere silence alone. Id. at p. 697. There is no presumption that a waiver has occurred, and courts use every reasonable intendment against the finding of waiver. Atlantic Ref. Co. v. Wyoming Nat. Bank, 51 A.2d 719 (Penn. 1947).

B. Insufficiency of Evidence Showing Waiver.

Waiver was not an appropriate theory for this case. The elements necessary to show waiver were not present in this case even viewing the evidence most favorably to Plaintiff.

Paragraph 11 of the contract is entitled, "Protection of Building from Water Damage". Plaintiff in its brief apparently argues that the agents of Defendant school district waived such protection and that any damage resulting to the building could not be chargeable to the roofing company. This assumption is clearly unsupportable.

Reviewing the testimony cited by Plaintiff in its brief concerning the covering and sealing of the roof, shows that at the most the agents of Defendant agreed to open up larger areas of the roofing surface on the assumption that visqueen would be used to protect the building. (Respondent's brief, pp. 2-4).

Mr. Jensen, Defendant's building inspector, testified that he told Plaintiff's employees it was their responsibility to protect the building and denied that he ever gave approval to use visqueen but stated that he would have to consult Mr. Ririe to determine whether this would be possible. (Respondent's brief, p. 5).

Even if Jensen's testimony was completely disbelieved and the favorable testimony given by the plaintiff's witnesses is fully believed there is still no showing of a knowledgeable waiver. In each instance quoted by Respondent the tearing up of large areas was conditioned upon the use of visqueen to protect the building. Plaintiff assured Defendant's agent that the

queen would prevent damage--Plaintiff was the expert and Defendant justifiably relied upon its expertise in acquiescing to the new procedure. If there was a waiver it was made under a "mistake or misapprehension of facts" that visqueen would protect the building even if it was not sealed in the customary manner.

Ken Bills stated that he was never told by anyone in Defendant's employment that the company was not responsible for preventing water from entering the building. (Tr., p. 192). Russell Bills testified he considered it his responsibility to prevent water damage to the building and that it was a necessary workmanlike procedure to protect the building. (Tr., p. 101). All of Plaintiff's witnesses agreed that they had to, in some way, protect the building.

It therefore can hardly be said that Defendant's agents, even assuming they had such authority, knowingly waived their right to insist that the building be protected from water damage, and, at the most, agreed to allow a new procedure in which the roof would not be done in small areas and sealed each night but would be done in large areas with visqueen on hand to seal the roof when necessary.

Likewise, the conduct of Defendants in writing the letters previously referred to as Exhibits 16 and 19 show the clear intent of Defendant in holding Plaintiff responsible for both the water damage that had already occurred, for future water dam-

age, and for delay.

In Waterway Terminals Co. v. P.S. Lord Mechanical Co., 406 P.2d 556 (Or. 1965) it was claimed that an owner of a sh waived his right to insist that a contractor provide insuranc on it. The court in that case looked upon the intent of the owner and held that he did not ever intend to release his rig to receive damages from fire simply because he tried to obta other insurance policies. The court in that case quoted a pr vious Oregon Supreme Court case which stated the rule as fol- lows:

> . . .[I]n the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the parties whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been mislead, to his prejudice, into the honest belief that such waiver was intended or consented to. To make out a case of waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose or act amounting to estoppel on his part.. . . Id. at 568.

Obviously, none of the parties in this action ever consi dered the school district to have waived the requirement that Plaintiff protect the building from water damage. Plaintiff's own employees admitted this fact, the letters from the board o education substantiated it further, and the efforts of Plaint to correct the water problem conclusively showed that Plaint was responsible for the damage.

Thus, Plaintiff did not change its position in any way in reliance upon the alleged statements made by the employees of the school district. It obviously did not change its position with reference to what it considered to be its obligation to prevent water damage to the building and its contents. What actually occurred was that the plaintiff was ineffective in accomplishing its responsibility. The submission of Instruction 14, in speaking in terms of "estoppel", was clearly unjustified and erroneous.

There was never any testimony or evidence showing that the alleged approval by Mr. Jensen or Mr. Ririe was made with the knowledge that the visqueen plastic would not protect the building from damage. Plaintiff was supposed to be the roofing expert. Even under the doctrine of apparent or ostensible authority it cannot be said that an agent's power goes beyond what is usual or necessary as ordinary administrative duties and an act which is adverse to the interest of the principal and which will not benefit him is clearly outside of any such authority. McConner v. Dickson, 233 P.2d 877 (Wyo. 1951).

For the agents of Defendant to have waived the requirement of protecting the building would clearly have been adverse to the interest of the school district and even if they had intended to do so there was obviously no authority either apparent or implied.

Thus, there was no sufficient evidence showing waiver of Paragraph 11 or the requirement that the job be done expeditiously in a workmanlike manner to submit to the jury. There was no conflicting evidence negating the fact that the building was not protected and continued to be damaged during the two-week period.

For this reason, the court should have ruled as a matter of law that no waiver was present and should have entered a verdict in favor of Defendant. Instead, the issue of waiver was submitted to the jury in Instruction No. 14 with no guidance as to the definition of waiver (including its essential elements) or no instruction that the agent had to have express, implied, or apparent authority. To confuse the jury even further, no interrogatory as to waiver was asked--only as to breach.

Additionally, the court's failure to rule as a matter of law that waiver was not present in this case was clearly erroneous.

CONCLUSION

This case involves extremely difficult legal concepts of breach, waiver, authority, and burden of proof. Admittedly, these concepts are difficult for lawyers and judges to thoroughly understand--this is why a jury has an impossible task before it when the court fails to sift the unnecessary issues and to allow the whole conglomeration to fall into the jury's lap--

with no instructions as to how to solve the problem.

Here, the trial court submitted the question of Plaintiff's breach to the jury when no factual question existed. The building wasn't protected, the damage wasn't stopped, and therefore the plaintiff unequivocally breached its obligation of protection of the building and performing in a workmanlike manner.

Here, the trial court submitted the question of waiver to the jury when there was absolutely no evidence that Defendant's agents had any authority to waive any contract provision and where the elements of waiver were not ever met. How can Plaintiff claim that Defendant's agents waived protection of the building from damage when the testimony cited by Plaintiff in its brief always was conditioned on the presence of visqueen?

Even if it is assumed arguendo that a jury issue was present the poor and incomplete instructions given to the jury on the elements of waiver, the complete absence of any instruction as to authority, and the failure to submit interrogatories concerning authority and waiver constituted a final error.

Much of this confusion is traceable to the failure of Plaintiff to give proper notice of his theory of the case. But since the trial judge himself suggested the theory to Plaintiff's counsel during the second day of trial, it is easy to see why such notice wasn't given. Defendant was denied the

chance to properly present its case because of this untimely change in theories.

For these reasons this Court should enter judgment in favor of Defendant, or, in the alternative, order a new trial.

Respectfully submitted,

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