1978

John Price Associates, Inc, A Corporation v. Richard J. Davis, And Connie M. Davis : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN PRICE ASSOCIATES, INC., a corporation, Plaintiff-Respondent,	)	
vs.	)	CASE NO. 15474
RICHARD J. DAVIS and CONNIE M. DAVIS, Defendants-Appellants.	)	

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE MARCELLUS K. SNOW, JUDGE.
CROSS-APPEAL FROM A JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT
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HONORABLE DAVID B. DEE, JUDGE.

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STATEMENT OF THE NATURE OF THE CASE

This is an action on a promissory note from Appellants to Respondent, and Appellants' Counterclaim for damages for breach of a construction contract.

DISPOSITION IN LOWER COURT

The lower court (Judge David B. Dee) granted Respondent's Motion for Summary Judgment on the promissory note and entered judgment accordingly, but in a separate Memorandum Decision refused to tax as costs the costs of taking Appellants' depositions. Appellants' Counterclaim was tried to a jury. The lower court (Judge Marcellus K. Snow) sustained Respondent's objections to the admissibility of certain evidence offered by Appellants, whereupon Appellants rested. The lower court then granted Respondent's motion for a directed verdict and entered judgment on the Counterclaim in favor of Respondent and against Appellants, no cause of action.

RELIEF SOUGHT ON APPEAL AND CROSS-APPEAL

Respondent seeks:

1. With respect to Appellants' Counterclaim, affirmation of the judgment in favor of Respondent and against Appellants, no cause of action.

2. Reversal of the Memorandum Decision refusing to tax the costs of taking Appellants' depositions and judgment with respect thereto in its favor, as a matter of law.

STATEMENT OF FACTS

The Official Report of Proceedings in the Trial Court will be referred to throughout this Brief by the letter "T" followed by the number of the specific page or pages referred to. Exhibits will be referred to as "EX" followed by the number of the specific exhibit or exhibits referred to. The Defendants-Appellants and the Plaintiff-Respondent will be referred to throughout as "Owners" and "Contractor," respectively.

As stated in the first paragraph of the Statement of Facts at page 3 of the Owners' brief, on or about August 28, 1972, the parties entered into a Standard Form of Agreement Between Owner and Contractor, EX D-3 (the "Contract"). However, contrary to the Statement of the Owners, construction of the nursing facility was originally to be completed on or before June 15, 1973 rather than June 15, 1972. See Article 3 of the Contract.

As stated in the third paragraph of the Statement of Facts on page 3 of the Owners' brief, completion of the drawings and specifications contemplated by the Contract was delayed. However, contrary to the Statement of the Owners, the issue of who was responsible for such delay was resolved on or about January 3, 1973 by the parties' entering into Change Order No. 1 to the Contract, which Change Order extended the Date of Completion of construction until August 1, 1973. See EX D-14.

As stated in the Statement of Facts in the fourth paragraph on page 4 of the Owners' brief, the parties entered into Change Order No. 2 to the Contract. EX D-10. Change Order No. 2 was entered into on or about August 27, 1973. However, contrary to the Statement of the Owners that the Owners had a valid claim against the Contractor for the delay in completion of construction, by Change Order No. 2, the parties memorialized their understanding and agreement that the execution of Change Order No. 2 would not waive any claim the Owners may have had against the Contractor by reason of the Contractor's failure to complete the project on or before August 1, 1973.

As stated in the Statement of Facts in the second paragraph on page 5 of the Owners' brief, on or about March 1, 1974, the parties entered into Change Order No. 4 to the

Contract. EX P-5 and EX P-6. However, what the Statement of the Owners failed to say was that by Change Order No. 4, the Contract Time as provided in the Contract was "increased as necessary to complete the work."

Contrary to the implication in the Statement of Facts in the fourth paragraph on page 5 of the Owners' brief, Change Order No. 4 did not constitute a new or separate agreement between the parties, but became instead an integral part of the Contract. Counsel for the Owners agreed with that proposition when he stated at trial "...it is apparent, certainly, by the wording, that the change orders become incorporated into the contract." T 37.

Other than as stated above, the Contractor agrees with the Statement of Facts as contained in the Owners' brief. However, the record establishes one additional fact relevant to the Owners' appeal but not mentioned in their brief, viz:

> On or about March 8, 1974, six months prior to making final payment on the Contract, the Owners executed a Certificate of Substantial Completion pursuant to which they accepted the subject nursing facility as substantially complete and assumed full possession thereof as of that date. EX P-7.

With respect to the Contractor's Cross-Appeal, the material facts are as follows:

On or about July 15, 1975, in paragraphs 3 and 6 of their Answer and Counterclaim, the Owners denied that they "voluntarily" executed and delivered the promissory note of September 9, 1974 (the "Note"), and alleged that the Note was signed by them only as a result of the Contractor's duress.

On or about May 20, 1976, Owner, Connie M. Davis, stated with respect to the Note in her sworn Affidavit the following:

> "2. That at the insistence of the plaintiff's agent, John Price, I executed the Promissory Note in question some time before September 11, 1973, but that I would not have executed said Note but for his assertions that he could not and would not complete a nursing home facility under a Contract which was dated August 28, 1972, until I executed said Promissory Note."

On or about May 20, 1976, Owner, Richard J. Davis, stated with respect to the Note in his sworn Affidavit the following:

> "2. That some time prior to September 11, 1973 (sic), the plaintiff, by and through its agent, John Price, approached me and said to the effect that he could not complete the Contract dated August 28, 1972 for the construction of a nursing home facility pursuant to plans and specifications for the sum agreed upon of $720,000.00 without my signing a Promissory Note in the amount of $10,708.39.
>
> 3. That but for John Price's insistence that he could not and would not complete the

project unless the Note were signed, I would not have executed the Note which was signed by me some time before September 11, 1973 (sic)."

On or about July 8, 1976 in their sworn Answer to the Contractor's Interrogatory No. 1, the Owners stated the following:

"On February 19, 1974, Change Order No. 4 was presented to your affiants for signature by the plaintiff to increase to $722,282.00 the original Contract amount, to pay for additional hardware on the doors of the nursing home facility as ordered by the State Fire Marshal. This Change Order was never executed by your affiants." (Emphasis added)

On or about September 19, 1977, Owner, Richard J. Davis, stated in his sworn Affidavit the following:

"2. That to the best of his recollection, the document entitled 'Change Order No. 4' was sent to his address for his signature on or about March 1, 1974....

5. That your affiant does not remember any typing at the bottom of Change Order No. 4, and particularly does not remember the words typed in said document at the time he signed the same with the following wording: 'The Contract time will be increased as necessary to complete the work.'

6. That it was your affiant's practice to initial any wording to a contract which may have been crossed out, or any additional wording to a contract, but your affiant did not initial the crossing out of the wording and the adding of the new words described in paragraph 5 above on Change Order No. 4; however, your affiant believes that he would have initialed the same had he been present at the time they were presented to him."

On or about October 11, 1976, Owner, Richard J. Davis, testified under oath at his deposition with respect to the Note as follows:

"Q You say Mrs. Davis and yourself went into Dangerfield's to sign that note?

A Yes.

Q He prepared it and you went in and signed it?

A Yes. I believe that I have only been in his office that one time.

Q But you went in and signed the note?

A Yes.

Q Was there any way he twisted your arm to sign it?

A No.

Q Was it an involuntary signing in any way?

A Well, I thought that was the easiest way out, making payments per month rather than the full sum.

Q Any undue influence by Mr. Dangerfield to make you sign it?

A No.

Q Any coercion or undue influence brought upon your wife to sign it?

A No.

Q How about the mortgage?

A No.

Q Anybody make any threats to you if you didn't?

A No.

Q Did you authorize him to deliver that note back to John Price Associates?

A Did he deliver it? I don't know.

Q Well, I think we'll find correspondence that he did and in your affidavit you said you thought he did.

A Okay, then why ask me that question?

Q I just want to know your best recollection of it.

A Yes.

Q Mr. Davis, you have indicated in certain documents on file in this action that somehow John Price Associates coerced or exerted undue duress upon yourself and Mrs. Davis with respect to this matter.

A Well, I don't think they're undue. All I keep saying is that the work wasn't completed. The contract was never completed on time and the interest rates went up and I lost the deal. That's what I claim. By the interest rates going up, I couldn't find anybody to loan me the money.

Q I imagine you have the same complaints Mrs. Davis has about what John Price has done to delay the matter but in terms of undue duress or influence upon you and Mrs. Davis, was there any undue duress or influence that was put upon you to sign that last note?

MR. SPRATLING: Counsel, are you referring to a specific--

THE WITNESS: Turnbow called me. Isn't that the guy's name?

Q (By Mr. Linebaugh:) I'm just telling you that the documents filed by you and your counsel in this case indicate that you claimed you had some improper influence or duress imposed upon you by John Price Associates.

A Well, sure, that fellow down there, that bookkeeper, called up all the time and said I had to sign a note there for them.

Q How does that make it improper duress or undue influence or--

A Well, he has called up all the time.

Q How did John Price Associates or any of its employees exercise their strong will over your weak will?

A Well, they have got a lot more money then I have.

MR. SPRATLING: I'm going to have to object. Where are you referring to coercion in the counterclaim?

MR. LINEBAUGH: You have an affirmative, duress, counsel. I'm talking about anyplace it appears, and it appears in the affidavit, in the pleadings, and in the answers to interrogatories, counsel.

MR. SPRATLING: If you allow me to point out to my client it may be--

Q (By Mr. Linebaugh:) If John Price Associates has exercised some undue influence over Mr. Davis, it seems to me he ought to be able to tell us.

A Well, they called me down a couple of times, I think it's Turnbow, in discussing matters--I mean all kinds of matters. I went over to his office, Turnbow's, two or three times.

Q I'm giving you a chance to give us your best possible shot at us, the thing that's going to convince the jury that John Price Associates really took advantage of the Davises.

A Because they didn't do their work and complete the contract on time.

Q How does that in any way convince you you ought to sign the promissory note?

A Well, John Price is a good friend of the head of the bank downstairs.

Q Go on, take your best shot.

A Yes. I think they got together and made these extensions go on. I didn't want the extensions to go on.

Q Anything else?

A No."

(Deposition of Richard J. Davis, page 41, line 18 through page 45, line 7.)

On or about October 11, 1976, Owner, Richard J. Davis, testified at his deposition with respect to Change Order No. 4 as follows:

"Q Directing your attention to Answer to Interrogatory Number One on page three, the second paragraph. It says, 'On February 19, 1974, change order number four was presented to your affiants for signature by the plaintiff to increase to $722,282, the original contract amount, to pay for additional hardware on the doors of the nursing home facility as ordered by the State Fire Marshal. This change order was never executed by your affiants.' I take it based on evidence produced it was never executed by Mrs. Davis, but you did execute change order number four.

MR. SPRATLING: Is this on the hardware or the doors?

MR. LINEBAUGH: This is change order number four.

MR. SPRATLING: That hasn't got anything to do with this.

THE WITNESS: Not for just the hardware. That's not right there.

MR. SPRATLING: I think that was the amount. That was two thousand something, $2,282.

Q (By Mr. Linebaugh:) In any case, yourself and Mrs. Davis' answer that says, 'This order was never executed by your affiants' is in error; is that right?

A Yes. I did sign it?

MRS. DAVIS: Yes, he did sign it."

(Deposition of Richard J. Davis, page 84, line 19 through page 85, line 15.)

On or about October 11, 1976, Owner, Connie M. Davis, testified at her deposition with respect to Change Order No. 4 as follows:

"Q (By Mr. Linebaugh:) Now, I show you what has been marked as Exhibit 28, which is a change order number four, dated February 19, 1974, and ask you if you have ever seen that document before?

A Yes. I think we did see this one because this is part of what we had to pay, was the hardware; isn't it?

MR. DAVIS: I paid the hardware.

THE WITNESS: Or maybe I haven't seen that list.

Q (By Mr. Linebaugh:) Is it fair to say that at the time you saw this change order, the original of this change order--

A I'm not sure I did see it. I was aware of the problem, but I'm not sure I saw that specific change order. I'm going to say no, I didn't see it.

Q With respect to the date of it, then, which is February 19, 1974, at least that's when Carl Olson signed it; and then your architect signed it on March 1, 1974, according to the copy.

A Yes.

Q As of those dates it is fair to say you had a lease with Hillhaven; is it not?

A Yes.

Q And as part of your lease with Hillhaven, you are to furnish them this building; is that right?

A Yes.

Q And is it fair to say that the changes that were described in this change order were to be included in the building that was the subject of your lease with Hillhaven?

MR. SPRATLING: She will not know that. I think when they talked about this, this hardware was acceptable. I think it was a later change. I'm going to object to the question.

MR. LINEBAUGH: I don't think it was in the original plans or the specs. I think these were later changes requested by Hillhaven regardless of when they came into being.

Q (By Mr. Linebaugh:) Were these in fact not required by your tenant?

A I don't know. I don't know whether it was the tenant that required them or the Fire Marshal or whoever required them. I just know that they were required.

Q Well, it says, 'Furnish and install additional hardware on doors as directed by State Fire Marshal.' And you agreed to pick up the cost of that; did you not?

A Yes.

Q And this is the change order to accomplish that purpose; is that fair to say?

A Yes, that's probably fair to say.

Q And do you have any quarrel with this change order?

A No.

Q Do you know whether you have ever paid that amount of money to John Price and Associates, the $2,282?

A I think we did but I'm not going to say positively. I would have to look that up in my records.

Q This change order also says, 'The contract time will be increased as necessary to complete the work.' Do you have any quarrel with that provision?

MR. SPRATLING: Where does it say that?

MR. LINEBAUGH: Just above the signature marks, counsel.

MR. SPRATLING: This is unsigned.

MR. LINEBAUGH: I know it's unsigned, but I just asked her if she has any quarrel with it, whether she signed it or not.

MR. SPRATLING: She stated time and time again that she thought they dillydallied around.

MR. LINEBAUGH: I want to know, counsel. This is the crucial question. Did she agree as of this date that the contract time could be increased as necessary to complete this work; did you agree to that:

THE WITNESS: I didn't feel it was necessary to increase the contract time because it was so overtime now that this little bit of changing of hardware could not have made much difference.

Q (By Mr. Linebaugh:) And you did not agree to that?

A I did not.

Q And if your husband did, he would have been crazy?

A I did not say that and you are putting words in my mouth.

Q Did you and your husband discuss whether that was an agreeable term between you, as to whether the contract could be extended to complete that as necessary?

A Yes. We discussed it and we decided no, we would not give any extensions on anything.

Q 'No way,' and he said that to you?

A And I said that to him.

MR. DAVIS: You don't see my signature on there.

(Whereupon Plaintiff's Exhibit 29 was marked for identification.)

Q (By Mr. Linebaugh:) I now show you what has been marked as Exhibit 29 and ask you if you have ever seen that document before?

A I don't think I have seen it.

Q Do you recognize your husband's signature on it?

A Yes.

Q Any reason to doubt that he signed that document?

A No."

(Deposition of Constance M. Davis, page 134, line 12 through page 138, line 5.)

On or about October 11, 1976, Owner, Richard J. Davis, testified at his deposition with respect to the Owners' joint interest in the subject nursing home facility as follows:

"Q Have you been a partner with your wife or been just alone in them?

A Well, my wife and I run them together but there is no partnership."

(Deposition of Richard J. Davis, page 6, lines 13 through 16.)

"Q With respect to the subject matter of this lawsuit, the rest home that was the subject of the contract that we are talking about, has your wife been extensively involved in negotiating any of these transactions along the line or was this pretty much your project?

A I think we worked on them together.

Q Did you take the lead in the negotiations or did she?

A Oh, I think that maybe she took a lot of the lead, yes.

Q Has there been anything that occurred between you that the other didn't agree to with respect to this transaction?

A Well, in respect to the nursing home?

Q Yes.

A Yes. I put it up for sale and didn't let her know about it.

Q Anything else that she may have disagreed with that you did in connection with this?

A I don't think so. You see, I didn't own the property; she owned it."

(Deposition of Richard J. Davis, page 9, line 8 through page 10, line 2.)

"Q I suppose you mean you and your wife?

A Yes.

Q You were in this thing together?

A Yes. But I don't have any idea when they were supposed to be paid."

(Deposition of Richard J. Davis, page 31, lines 19 through 23.)

On or about October 11, 1976 and after Owner, Richard J. Davis, had testified at his deposition with respect to the Owners' joint involvement in the subject nursing home facility, Owner, Connie M. Davis, testified at her deposition as follows:

"Q Now, with respect to any of the questions and answers that have been given directed to your husband and given by your husband up to this moment, do you wish to change any of those answers? I realize that maybe it will be very difficult for you to do. If something sticks out in your mind that you know is obviously erroneous, then let's get at it.

A The only thing that I could say is that most of the documents that you have referred to that we do not have I'm sure are on file with Commercial Security Bank. I think the reason for the redoing of the Phil-Rae Corporation lease was at the request of the S.B.A. And it was not a loan; it was a guaranteed lease."

(Deposition of Constance M. Davis, page 10, lines 3 through 14.)

Contrary to the lower court's Memorandum Decision of October 20, 1977, the Owners' depositions were used to rebut their contention at trial that the Owners were not jointly involved in the subject transaction. T 51-53.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY GRANTED THE CONTRACTOR'S MOTION FOR A DIRECTED VERDICT.

At page 2 of their brief, the Owners imply that the trial court's Order directing a verdict in favor of the Contractor somehow summarily cut off the Owners from presenting their case in chief. However, the Contractor's Motion

for a Directed Verdict was not made until after the Owners had rested their case. T 53 and 54. The Owners rested their case because the trial court sustained the Contractor's objection to the admissibility of any evidence relating to any breaches of contract, which breaches allegedly occurred prior to March 1, 1974, the date of Change Order No. 4, and/or final payment of the Contractor on or about September 12, 1974. Thus, the real issue in this case is whether the trial court correctly sustained the objection. The Contractor contends that the trial court correctly sustained the objection for two reasons: (1) Change Order No. 4 superseded Change Order No. 2; and (2) by payment of all sums due the Contractor, the Owners waived any claim they may have had for unsatisfactory prosecution of the work.

A. CHANGE ORDER NO. 4 SUPERSEDED CHANGE ORDER NO. 2. At page 7 of their brief, the Owners concede that Change Orders 1, 2 and 4 "were executed by the parties." Change Orders number 2 and 4 are the only ones pertinent to the issues now before the court.

At pages 8 through the first paragraph on page 10 of their brief, the Owners cite several authorities for the proposition that written subsequent amendments, alterations and/or modifications of a written contract and/or

written changes thereto, will supersede the earlier documents. The proposition is elementary and clearly supports the Contractor's contention that Change Order No. 4 superseded Change Order No. 2 to the extent that the provisions of both are inconsistent.

When the parties entered into the Contract on August 28, 1972, they agreed that:

> "8.1 The Contract Documents consist of this Agreement (which includes the general conditions), Supplementary and other Conditions, the Drawings, the Specifications, all Addenda issued prior to the execution of this Agreement, all Amendments, Change Orders, and written interpretations of the Contract Documents issued by the Architect. These form the Contract and what is required by any one shall be as binding as if required by all. The intention of the Contract Documents is to include all labor, materials, equipment and other items as provided in paragraph 11.2 necessary for the proper execution and completion of the Work, and the terms and conditions of payment therefor, and also to include all Work which may be reasonably inferable from the Contract Documents as being necessary to produce the intended results.
>
> . . . .
>
> 8.3 The term "Work" as used in the Contract Documents includes all labor necessary to produce the construction required by the Contract Documents and all materials and equipment incorporated or to be incorporated in such construction." (Emphasis added) EX D-3, paragraphs 8.1 and 8.3.

From the foregoing, it is apparent that "Change Orders" were considered "Contract Documents" and were integrated into the "Contract." It is also clear that "Work" was a term of art when used in the Contract Documents which together formed the Contract.

The Contract also provided:

> "16.2 If the Contractor is delayed at any time in the progress of the Work by changes ordered in the Work, by labor disputes, fire, unusual delay in transportation, unavoidable casualties, causes beyond the Contractor's control, or by any cause which the Architect may determine justifies the delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.
>
> . . . .
>
> 22.1 The Owner without invalidating the Contract may order Changes in the Work consisting of additions, deletions or modifications, the Contract Sum and the Contract Time being adjusted accordingly. All such Changes in the Work shall be authorized by written Change Order signed by the Owner or the Architect as his duly authorized agent.
>
> 22.2 The Contract Sum and the Contract Time may be changed only by Change Order." (Emphasis added) EX D-3, paragraphs 16.2, 22.1 and 22.2.

From the foregoing, it is apparent that "Contract Sum" and "Contract Time" were terms of art when

used in the Contract Documents, which Contract Documents included Change Orders.

On August 27, 1973, in Change Order No. 2, the Owners expressly reserved "any claim which they may have against Contractor by reason of Contractor's failure to complete the project on or before August 1, 1973." (Emphasis added). However, over six months later, on March 1, 1974, the Owners and their Architect agreed to Change Order No. 4 which expressly provided that "the Contract Time will be increased as necessary to complete the work." EX P-6. There can be no question but what Change Order No. 4 was an amendment as to both the Contract Sum and the Contract Time provided for in the Contract. This is clear from the fact that Change Order No. 4 expressly indicates that it is a Change Order with respect to a Contract dated August 28, 1972 for the "Davis Nursing Home" and that the original Contract Sum of $720,000.00 would be increased to $722,282.00.

The Owners argue that even though Change Order No. 4 changed the Contract, it did not supersede the express reservation of a potential claim provided for in Change Order No. 2. The obvious answer to that is that the Contractor simply cannot be held responsible for not

completing the Work on August 1, 1973 when the Owners contracted for additional labor and materials over six months later. Note that Change Order No. 4 did not merely extend the Contract Time as did Change Order No. 2, but Change Order No. 4 also obligated the Contractor to furnish additional labor and materials as well as obligated the Owners for an additional Contract Sum and enough additional Contract Time to complete the Work. In other words, the Work as contemplated by the original Contract was amended to include the additional work as contemplated by Change Order No. 4 and it was impossible for the Contractor, by August 1, 1973, to have done the Work as contemplated by the Contract Documents taken as a whole. Consequently, it does not make sense to say that any claim reserved by Change Order No. 2 would not be abrogated by Change Order No. 4. On the contrary, it does not make sense any other way. How can the Owners be allowed on the one hand to collect damages from the Contractor for failure to complete the Work by August 1, 1973 and at the same time obligate the Contractor to include in that Work additional labor and materials that were not even ordered until more than six months later. Remember, "Work" has a well defined meaning in the Contract and Change Order No. 4, and there is nothing in Change Order No. 2 that changes that meaning.

Not only did the Owners agree to Change Order No. 4, but a week later on March 8, 1974, the Owners executed a Certificate of Substantial Completion. EX P-7. Neither Change Order No. 4 nor the Certificate of Substantial Completion reserved in any way any claim in favor of the Owners based on the Contractor's failure to prosecute the Work to completion by August 1, 1973. Under such circumstances, the case law clearly establishes the proposition that the Owners waived their alleged claim. In Steenberg Construction Co. v. Prepakt Concrete Co., 381 F.2d 768 (10th Cir. 1967), the court had under consideration a subcontract with respect to construction of the earthen dam at Lost Creek, Utah. At the insistence of the subcontractor, the parties had negotiated an additional provision to the subcontract which stated: "Progress schedule date to be mutually agreed upon in writing..." The subcontractor contended that it was released from any of its obligations under the subcontract because the parties never did agree in writing to any progress schedule. However, Judge Murrah, writing for the Tenth Circuit Court of Appeals, held that the subcontractor waived the requirement of a written work schedule by the subcontractor's subsequent execution of a performance bond and its oral agreement to

perform the subcontract pursuant to a work schedule not agreed to in writing. In the case at bar, there is also a contract modification insisted upon by the Owners (Change Order No. 2), but there is also the subsequent written modification agreed to by the parties (Change Order No. 4). If the oral agreement in Steenberg constituted a waiver, a fortiori, the Owners waived the subject claim by the written provisions of Change Order No. 4 and the Certificate of Substantial Completion.

Further, as late as 1974 in a case similar to the one now before the court, the Colorado Supreme Court has held in Rockwell v. Mountain View Electric Association, Inc., _____ CO.____, 521 P.2d 1272 (1974) that the execution of change orders can reasonably be considered acts inconsistent with an alleged intent to hold a contractor to the requirements of a provision requiring completion of a construction project by a time certain.

While the execution of Change Order No. 2 did not cause the Owners to waive any claim based on the Contractor's failure to complete the project by August 1, 1973, the execution of the subsequent documents surely constituted such a waiver. Accordingly, it would have

been a waste of time for the trial court to admit evidence before the jury with respect to whether the Contractor justifiably failed to complete the Work by August 1, 1973.

There are three errors in the Owners' brief which should be noted: (1) In the next to the last paragraph on page 7, the Owners indicate that the completion date was extended by Change Order No. 2 to a date beyond "August 1, 1977;" however, the date which appears twice in that paragraph should be "August 1, 1973." EX D-10; (2) in the next to the last paragraph on page 11, the Owners contend that the Contractor conceded at trial "that the provisions of Change Order Number Two would still be alive, except for the payoff by the Owners of the Contract on September 12, 1974;" however, a reading of all of the last three-quarters of page 46 of the trial transcript (although less than a complete transcript of all that was said), indicates that the Contractor made no such concession; and (3) in the last sentence of the last paragraph on page 11, the Owners stated: "the Contractor, knowing it was in default, still agreed to be liable to the Owner for delay damages, while at the same time seeking an extension in which to complete the Contract;" however, there is nothing in the record to

indicate that the Contractor admitted at any time that it was in default, nor is there anything in the record to indicate that the Contractor agreed to be liable to the Owners for delay damages, even though the Contractor did agree that as of August 27, 1973, the Owners had reserved any claim they "may" have had against the Contractor. EX D-10.

B. BY PAYMENT OF ALL SUMS DUE THE CONTRACTOR, THE OWNERS WAIVED ANY CLAIM THEY MAY HAVE HAD FOR UNSATISFACTORY PROSECUTION OF THE WORK. At page 12 of their brief, the Owners concede that paragraph 17.4 of the original Contract "provides that final payment by the Owner does constitute a waiver of all claims of the Owner against the Contractor, with four exceptions, none of which probably apply here." (Emphasis added). The Owners then contend that Change Order No. 2 constituted a "fifth exception" to the waiver provided for in paragraph 17.4.

Subsequent to August 27, 1973, the date of Change Order No. 2, the Owners agreed to the provisions of Change Order No. 4, EX P-6; the Certificate of Substantial Completion, EX P-7; the letter of September 4, 1974 from Owner, Richard J. Davis, to Commercial

Security Bank authorizing the bank to make final payment to the Contractor, EX P-8; and the letter of September 12, 1974 from Commercial Security Bank to the Contractor transmitting such final payment, EX P-9. However, there is nothing in any of such subsequent documents preserving any such fifth exception.

It is one thing to say that by entering into Change Order No. 2 that the Owners did not waive any claim they may have had for the Contractor's failure to complete the Work by August 1, 1973, and quite another thing to say that final payment over a year later and over nine months after the November 30, 1973 completion deadline of Change Order No. 2, and over six months after Change Order No. 4 and the Certificate of Substantial Completion, did not waive any such claim pursuant to the plain language of paragraph 17.4 of the Contract. Note that paragraph 17.4 says that final payment constitutes the waiver, and note also that Change Order No. 2 expressly provides that the construction lender would continue to disburse "funds for construction purposes per the terms and conditions of the Contract." (Emphasis added). There is nothing in Change Order No. 2 that indicates that paragraph 17.4 does not mean precisely what it says. This court has previously held that "no

damage" clauses in construction contracts (which clauses are more harsh than the waiver clause now under consideration) mean what they say and are enforceable. See Western Engineers, Inc. v. State Road Commission, 20 U.2d 294, 427 P.2d 216 (1968).

The applicable rule of law with respect to waiver is included in the following from Williston on Contracts:

> " 'Where timely performance is of the essence of the contract, a party who does any act inconsistent with the supposition that he continues to hold the other party to his part of the agreement will be taken to have waived it altogether. When a specific time is fixed for the performance of a contract and is of the essence of the contract and it is not performed by that time, but the parties proceed with the performance of it after that time, the right to suddenly insist upon a forfeiture for failure to perform within the specified time will be deemed to have been waived and the time for performance will be deemed to have been extended for a reasonable time.' " 6 Williston, Contracts, §856 p. 232 (3d ed. 1962)

In the instant case, the execution and delivery of Change Order No. 4, the Certificate of Substantial Completion, the letter of September 4, 1974, and the letter and final payment of September 12, 1974, all constitute acts "inconsistent with the supposition that" the Owners continued to hold the Contractor to the August 1, 1973 completion date.

In light of the provisions of paragraph 17.4 of the Contract, final payment alone surely constituted the Owners' waiver. In Milaeger Well Drilling Co. v. Muskego Rendering Co., 1 Wis.2d 573, 85 N.W.2d 331 (1957), it was held that even a partial payment effectively waived unreserved claims known to the owner at the time of partial payment. Here, the Owners clearly knew about their alleged claim, but just as clearly made final payment on the Contract without any reservation of such claim.

Based upon the fact that the Owners made final payment on the Contract as provided in paragraph 17.4 thereof, such final payment clearly waived any claim the Owners may have had for the Contractor's unjustifiable failure to complete the project by August 1, 1973. Accordingly, the trial court was correct in ruling that evidence on that issue was irrelevant and immaterial.

POINT II

THE LOWER COURT ERRED IN REFUSING TO TAX THE COSTS OF TAKING THE OWNERS' DEPOSITIONS.

The Contractor is aware that in order to recover the costs of the Owners' depositions, the burden is upon the Contractor to establish that such depositions were necessary and reasonable and that whether that

burden was met was within the sound discretion of the lower court. First Security Bank of Utah, N.A. v. Wright, ___ U.___, 521 P.2d 563 (1974). However, the Contractor contends that the lower court's Memorandum Decision on this issue was arbitrary or a clear abuse of the court's discretion.

The subject Memorandum Decision was not made until after the trial and judgment with respect to the Owners' Counterclaim, and the lower court's finding that the depositions were not used at trial is directly contrary to the trial transcript. The Owners' depositions were used at trial to rebut the Owners' contention that Owner, Richard J. Davis, was not acting for Owner, Connie M. Davis, with respect to the subject transaction.

The error of the lower court is further demonstrated by the fact that prior to the taking of the Owners' depositions, the Owners had taken the position under oath in affidavits and in answers to interrogatories that: (1) the Note had been signed under duress; and (2) that neither of the Owners had ever signed Change Order No. 4. Contrary to those assertions, the Owners' subsequent depositions make clear that the Note was not signed under duress and Owner, Richard J. Davis, did in fact sign Change Order No. 4. Further, even after the

taking of the Owners' depositions, Owner, Richard J. Davis, took the position under oath in a sworn affidavit that certain key provisions of Change Order No. 4 were not included in the Change Order when he signed it. However, that position is directly contrary to the deposition testimony of Owner, Connie M. Davis, when she stated under oath that the same key provisions were in Change Order No. 4 and were discussed between the Owners prior to the signing of such Change Order by Owner, Richard J. Davis.

Surely it must be conceded that the duress issue was material to the Contractor's recovery of judgment on the Note and that whether the Owners agreed to Change Order No. 4 was material to whether the Owners had waived the alleged cause of action described in their Counterclaim. In Lawson Supply Company v. General Plumbing and Heating, Inc., 27 U.2d 821, 493 P.2d 607 (1972), this court held that the costs of depositions may be taxed in a proper case and indicated that the test for such determination "is whether the deposition was necessarily obtained in the sense that the taking of the deposition and its general content were reasonably necessary for the development of the case in the light of the situation then existing." In

Lawson it was pointed out that at least one fact was discovered by deposition which was of great significance to the prevailing party's case. Certainly, the same can be said for the case at bar where the depositions not only uncovered facts of great significance, but also uncovered facts that were directly contrary to previous positions taken by the Owners under oath. Note also, that in the case at bar, the Contractor did not take the depositions of the Owners until after the Contractor had received the Owners' response to the Contractor's interrogatories.

Having put the Contractor to the expense of taking their depositions because of their untruthful affidavits and answers to interrogatories, the Contractor contends that it is entitled to have the Owners pay for such conduct by paying for the costs of their depositions.

CONCLUSION

Because Change Order No. 4 and all of the other subsequent documents agreed to by the Owners superseded the reservation of any alleged claim as provided in Change Order No. 2, and because the Owners' final payment on the Contract expressly waived any such alleged

claim, the trial court correctly sustained the Contractor's objection to the admissibility of the Owners' evidence, and the trial court correctly granted the Contractor's Motion for a Directed Verdict after the Owners rested their case in chief. Accordingly, the Contractor is entitled to have the judgment of the trial court affirmed.

Because the lower court's Memorandum Decision of October 20, 1977 is based upon the erroneous finding that the Owners' depositions were not used at trial and because such Memorandum Decision apparently did not take into consideration the practical and reasonable necessity of the Owners' depositions in this matter, the Contractor is entitled to have judgment in its favor and against the Owners for an additional $516.75.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 16th day of March, 1978, two copies of this Brief of Respondent were served upon counsel for Defendants-Appellants by delivering such copies to the office of David K. Smith, 4735 Highland Drive, Salt Lake City, Utah 84117.

Kent B Linebaugh