1977

# Cox Construction Company, Inc v. State Road Commission of Utah : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COUNT OF THE STATE OF UTAH

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COX CONSTRUCTION CO[illegible] :
INC.,

P[illegible] and
Respondent,

vs.

STATE ROAD COMMISSION OF
UTAH,

Defendant and
Appellant.

[illegible]

[illegible]

THE [illegible]

[illegible]

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| Plaintiff and Respondent, | : | |
| vs. | : | Case No. 15499 |
| STATE ROAD COMMISSION OF UTAH, | : | |
| Defendant and Appellant. | : | |

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# BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

This case involves the propriety of an award of interest by the Court on three separate amounts which were determined to be due and owing Respondent and which had been paid by Appellant and accepted by Respondent without the mention of interest.

## DISPOSITION IN LOWER COURT

Respondent filed a motion for partial summary judgment seeking an award of interest on three separate amounts previously determined to be due and owing Respondent

Appellants contention in opposition to Respondent's motion was that the amounts paid constituted an accord and satisfaction. The trial Court, Judge Marcellus K. Snow, presiding granted partial summary judgment in favor of Respondent and against Appellant for the sum of $21,532.24 which was entered of record on the 30th day of August, 1977. Defendant-Appellant State Road Commission now known as the Utah Department of Transportation appeals.

## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the partial summary judgment and a judgment denying Respondents claim for interest.

## STATEMENT OF FACTS

On or about January 29, 1971 the parties entered into an arbitration agreement which agreement involved claims for additional payment allegedly due Respondent on nine separate highways projects. (Exhibit 1 to affidavit in support of motion for partial summary judgment dated November 19, 1976.) The second paragraph of said agreement obligates Respondent to file its claims with full documentation within 90 days from the receipt of project documents which were made available to Respondent at the time the agreement was consummated.

Pursuant to the arbitration agreement part of the dispute between the parties on Project FLH-42(6) second

contract and S-037(4) first contract, Poison Springs Wash to Trachyte Junction was decided by the arbitration panel on December 28, 1972 (Exhibit 5 to affidavit in Support of motion for partial summary judgment). The panel awarded the sum of $1,745 and the parties agreed to the payment of additional sums which together totaled $23,279.98. (See Exhibit A attached to affidavit of Don R. Strong in opposition to plaintiff's motion for partial summary judgment dated December, 1976.) Said Exhibit A just referred to is a letter from Respondent's counsel and makes no reference to interest on the agreed amounts. The amount referred to was paid March 19, 1973. The final estimate invoice was submitted on said project on May 20, 1969. (Affidavit in support of motion for partial summary judgment.)

The claims on the project designated as FLH 42(6) third contract and S-0370(4) second contract, Hanksville to Poison Springs Wash were settled by stipulation dated the 15th day of February, 1974 for the total sum of $15,134.47, and said sum was paid March 21, 1974. (See paragraph 8 of affidavit in support of motion for partial summary judgment and Exhibit 3 attached thereto.) No provision for interest is made or referred to in the stipulation.

The claims of Project I-IG-15-8(26) 357 and F-FG-001-8(4), North Perry to US-30-S 14th South Street to I-15 and US-30 were settled by stipulation between the parties

on July 20, 1974. The total amount agreed upon was $28,808.72, and said sum was paid July 22, 1974. The final estimate invoice was submitted October 5, 1967. Again no reference is made in the stiputlation to interest. (See affidavit in support of motion for partial summary judgment, paragraph 8 and Exhibit 2.)

The stipulations referred to were prepared by counsel for Respondent. (See letter dated July 5, 1974 signed by John F. Piercey attached to affidavit of Leland D. Ford attached to motion for summary judgment denying interest on amounts paid under stipulation, etc.)

All three of the projects referred to were settled for less than the original claimed amounts. (See affidavits of Leland D. Ford and Don R. Strong in opposition to plaintiff's motion for partial summary judgment.)

The original arbitration agreement does reserve all questions of law to be heard by a District Judge of the Third Judicial District in and for Salt Lake County. (Eight paragraph of arbitration agreement which is Exhibit 1 to affidavit in support of motion for summary judgment). None of the stipulations or other documents connected with these three projects reserve the question of interest payment. Respondent motion for partial summary judgment on the three projects in question was filed in November, 1976 which is 28 months after the last project had apparently been settled.

During the time that the stipulations were being arrived at and prior thereto it was mutually understood by counsel for the respective parties that interest on claims of this nature was not paid by the state. (See affidavits of Leland D. Ford and Don R. Strong in oppostion to plaintiff's motion for partial summary judgment). Respondent's motion for partial summary judgment was filed on the 19th day of November, 1976. It was heard on the 27th day of July, 1977 and judgment entered on August 30, 1977.

## ARGUMENT

### POINT I

### THE STIPULATIONS BETWEEN THE PARTIES CONSTITUTE AN ACCORD AND SATISFACTION.

The general law on accord and satisfaction is expressed in 1 AmJur. 2d 330 (Sec. 33, Accord and Satisfaction) wherein it is stated as follows:

> Where a claim is unliquidated, or, if liquidated, there is a bona fide doubt or controversy exists as to whether anything is due, then an accord and satisfaction may be established and held binding, although there is payment of a sum less than that claimed by the creditor, or even a sum less than that which, on an actual computation, might be found due to the creditor. The consideration in the settlement of such a claim lies in the mutual concessions of the parties,..." (Citing among other cases the case of Ralph A. Badger & Co. v. Fidelity Building & Loan Association, 94 U. 97, 75 P.2d 669.)

It is further stated in 1 AmJur. 2d at page 348 under section 52 dealing with the effect of accord and satisfaction as follows:

> If the accord constitutes a binding contract and it is fully performed, the performance satisfies the original claim and operates as a final bar to the demand or subject matter of the agreement for accord and satisfaction. (Citing several cases along with the following:
>
> > The voluntary settlement of differences between parties in respect of their rights, where all have the same knowledge or means of obtaining knowledge concerning the circumstances and there are no frauds, misrepresentations, concealments, or other misleading incidents, must stand and be enforced, although the settlement made by the parties in their agreement might not be that which the court could have decreed had the controversy been brought before it for decision. Young v. Stephenson, 82 Okla. 239, 200 P. 225, 24 A.L.R. 978, emphasis supplied.)

Appellant submits that the emphasized statement above exactly fits the facts of this matter. There was a bona fide accord between the parties on the three cases involved as to sums to be paid in satisfaction of Respondent's claims. The sums upon which accord was reached were all paid, thus performing the accord. This was a "voluntary settlement" by the parties. In light of the recent pronouncements of the Utah Supreme Court regarding the payment of interest on claims of this nature in the cases of Uinta Pipeline Corporation v. White Superior Co., 546 P.2 885 and

Jack B. Parson Company vs. State of Utah, 552 P.2 107, the accord conceivably "might not be that which the Court would have decreed had the controversy been brought before it for decision." It is submitted that this Court should refuse to upset the accord and satisfaction which the parties freely entered into by an award of interest in addition to the agreed settlement figure.

The following statement from the Badger case, supra, seems to Appellant to be dispositive:

> ...In the case last cited (Browning v. Equitable Life Assn. Soc. of U.S., 72 P.2d 1960) we said: 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 apart in good faith presents such consideration....

## POINT II

## WHEN THE STIPULATIONS AT ISSUE WERE ENTERED INTO THE PARTIES BELIEVED THAT THE STATE WAS NOT REQUIRED TO PAY INTEREST AND INTEREST SHOULD NOT BE ALLOWED, OR IN THE ALTERNATIVE SHOULD BE TERMINATED APRIL 29, 1971.

The recent cases decided by the Utah Supreme Court in Uinta Pipeline Corporation v. White Superior and Jack B. Parson Construction Company vs. State of Utah, supra, have established the requirement by the State to pay interest on

unliquidated claims, such as the three claims which were settled by stipulation, and which form the basis of Respondent's motion for partial summary judgment. At the time the three stipulations which are at issue were entered into it was the mutual understanding of counsel for both parties that the State of Utah was not obligated to pay interest on claims of this nature. Respondent well knows that the State had traditionally not paid interest on claims of this nature. Counsel for the parties had discussed this on numerous occasions and the assertion of Appellant's counsel that this was in fact the understanding of Respondent's counsel is unchallenged. (See affidavits of Leland D. Ford and Don R. Strong in opposition to plaintiff's motion for partial summary judgment.) The fact that this may have been erroneous should not affect the settlements arrived at. The settlements were arrived at with the understanding that interest was not payable and may or may not have been influenced as to amount by that now apparent erroneous conclusion. To allow the recovery of interest at this point would work an injustice and result in a windfall to Respondent.

It should be further pointed out that the claims were all filed well beyond the 90-day provision set forth in the stipulation entered into between the parties (Exhibit 1 to the affidavit of Cecil Cox in support of plaintiff's

motion for summary judgment.) The timeliness of the 90-day provision while important in the ultimate resolution of the claims was not considered critical by Appellant until the reality of the payment of interest was decided by the recent decisions of this Court in Uinta Pipeline and Jack B. Parson, supra. By Respondent's failure to file its claim within the 90-day period it forces Appellant to pay increased interest by the simple device of delaying the filing of claims. As long as interest was not being paid the urgency of enforcing the 90-day provision was not apparent to Appellant.

It is therefore respectfully submitted that if the Court in fact deems that interest must be paid by Appellant, then it is respectfully submitted that that interest requirement should terminate 90 days from the date of the execution of the agreement between the parties to arbitrate the various claims. Respondent has in fact been delinquent since that date in the filing if its claims and should not profit because of its own delinquency when that delinquency is not in any way attributable to Appellant. The 90-day period from the date of the original agreement would end April 29, 1971, and it is respectfully submitted that no interest should be allowed Respondent for any reason beyond said date unless its submission to the arbitration panel was made within the 90-day period.

## POINT III

### IF THE STIPULATIONS AT ISSUE CREATE AN AMBIGUITY THEY SHOULD BE CONSTRUED AGAINST RESPONDENT SINCE THEY WERE DRAFTED BY RESPONDENT'S COUNSEL.

Appellant submits that if the Court is of the opinion that by failing to specifically refer to interest the stipulations are ambiguous, then it is respectfully submitted by Appellant that they should be construed against Respondent since all three stipulations were drafted by Respondent's counsel.

This Court has recently spoken on this point in the case of Wells Fargo Bank, N.A. v. Midwest Realty & Finance, Inc., a 1975 case found at 544 P.2d 882. At page 885 the Court makes this statement:

> ...In dealing with a document which is ambiguous or uncertain, the general rule is that it should be construed strictly against the party who wrote it (Midwest) and favorably to the other party against whom it is envoked (Wells Fargo). Further, when a document is of that character, the trial court can take extraneous evidence and look to the total circumstances to determine what the parties should reasonably be deemed to have understood thereby. These principles are to be considered together with this further proposition: That where there was dispute, it is the prerogative of the trial court to determine whose evidence he will believe.

It is further submitted by Appellant that when the stipulations were entered into they clearly were intended to completely resolve the issues between the parties as to the

claims covered by the stipulations. This is apparent from the letter dated July 5, 1974 from Respondent's counsel to Appellant's counsel which accompanied the stipulation between the parties on the North Perry to U.S. 30-S or Brigham City claim. That letter reads as follows (omitting heading and reference line):

> Dear Lee:
>
> I believe the enclosed stipulation sets forth our settlement on the Brigham City claim. If you have any changes or suggestions, please call me. If it meets with your approval, please sign and return the original and one copy to me.
>
> Thank you for your assistance.
>
> Very truly yours,
>
> John F. Piercey

Note the use of the word "settlement." There was no question of the intent of the parties in July of 1974 that the entire matter was being "settled" by the agreement to pay the sum as set forth in that document. Likewise for the two other projects.

This Court has in the recent case of Big Butte Ranch, Inc. vs. Marjorie R. Holm, et al. (Case No. 14630 decided October 3, 1977) stated the following:

> ...to ascertain the meaning of the agreements, the Court should first examine the language of the instruments and accord to it the weight and effect which it may show was intended and if the meaning is ambiguous or uncertain then consider parol evidence of the parties' intentions. (citing Mathis v. Madsen, 1 U 246, 261 P.2 952...

Using this approach, if the agreement and the letter are fairly interpreted, the payment of interest should not be allowed. On the other hand, if they are deemed to be ambiguous then the parol evidence is that it was understood by counsel for the parties that interest was not in the contemplation of the parties due on the agreed settlemetn amounts.

According to the following language from the Lake v. Hermes Associates, 552 P.2 126 (1976) it is proper for this Court to make its own interpretation of the documents in question. In the cited case this Court said the followi

> ...However, in a case of this nature, where the resolution of the controversy depends upon the meaning to be given documents, the trial court is in no more favored position and is no better able to determine the meaning of such documents than is this Court. Therefore, as to such an issue, those presumptions do not apply. (citing Burns v. Skopstad, 69 Idaho 227, 206 P.2d 765 (1949)).

It is therefore clear that this Court can examine the documents which create the dispute and the circumstances and events leading up to the execution of the documents and examine the language to determine whether or not they were intended to be full and complete payment to respondent as urged to Appellant. If they are ambiguous it is submitted that the ambiguity should be resolved against Respondent.

## POINT IV

### THE THREE STIPULATIONS BY THEIR TERMS DO NOT REFER TO ANY RESERVATION INVOLVING THE ORIGINAL ARBITRATION AGREEMENT ON LEGAL QUESTIONS.

One of the Respondent's arguments is that all questions of law in dealings before the arbitration panel were to be reserved for a determination by the Third District Court. Appellant submits that since all three stipulations were entered into subsequent to that original stipulation and since none of the three stipulations by their terms make reference to the original arbitration agreement reservations, as to legal questions that they are intended to supersede said document insofar as the stipulations are concerned with various individual projects. They do not, in fact, make any reservation for later determination except a few factual disputes to be solved by reference to the panel and as to the individual projects they supersede and replace the original agreement to arbitrate. Since by their own terms there is not a provision for interest it is improper to insert same judicially.

## POINT V

### RESPONDENT'S RECEIPT OF PAYMENT AND SILENCE IN DEMANDING THE PAYMENT OF INTEREST FOR 28 MONTHS SHOULD ESTOP RESPONDENT FROM NOW ASSERTING ITS CLAIM FOR SAME.

The payments made on the three projects referred to above by Appellant to Respondent occurred more than 28 months

prior to the filing of the motion for partial summary judgment. No request or demand for the payment of the accrued interest on the amounts found to be due and owing was ever made to Respondent from and after the dates of payment.

In the Big Butte Ranch, Inc. vs. Marjorie R. Holm, et al. case, supra, this Court has stated the following:

> ...The test of estoppel is objective in nature as to what a reasonable person, under the circumstances, might conclude (citing Corporation Nine v. Taylor, 30 Ut. 2d 47, 513 P.2 417 (1973)...

It is respectfully submitted that silence by respondent over such an extended period is enough to raise an estoppel, particularly when it is coupled with the written stipulations and with the other communications which make reference to the agreed amounts as "settlements" and when no reference is made to interest at any time.

## CONCLUSION

Appellant respectfully submits that the judgment of the trial court in awarding summary judgment against appellant for the sum of $21,532.24 is erroneous. It is barred by the accord and satisfaction reached between the parties which in each instance involving the three projects referred to was in excess of 28 months prior to the filing of a motion for partial summary judgment by respondent claiming interest on the agreed sums.

If the accord and satisfaction of the parties does

not bar recovery then Appellant respectfully submits that Respondent will reap a windfall based on a mutual mistake by the parties and it is simply inequitable to allow Respondent to recover on that basis.

Appellant further submits that at the very least the stipulations involved in the three cases were prepared by Respondent's counsel and do not provide for interest nor do they reserve that question for future determination. The original agreement to arbitrate the disputes proved for a reservation of legal questions, but the stipulations supersede and replace the original agreement and if by their failure to resolve the question of interest they are obviously ambiguous. The general rule and certainly the Utah rule would resolve said ambiguity against the Respondent.

It is also apparent that Respondent has been in default of the original agreement to arbitrate in that he did not file his claim within the 90-day period specified in the arbitration agreement and should not profit as a result of his own lack of diligence.

Finally, Appellant also submits that the continued silence of Respondent for a period in excess of 28 months from the date upon which the last payment was made by Appellant to Respondent should estop Respondent from recovery of any additional sum.

Appellant respectfully submits that the judgment

should be reversed by this Court and additionally that Respondent's motion for partial summary judgment should be dismissed with prejudice.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

By Leland D. Ford
LELAND D. FORD
Assistant Attorney General
Attorney for Appellant

CERTIFICATE OF MAILING

This is to certify that two copies each of the foregoing Appellant's Brief were mailed, postage prepaid to John F. Piercey, 72 East Fourth South, Salt Lake City, Utah 84111, Attorney for Respondent, this 12th day of December, 1977.

Joan M. Shields