1978

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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COX CONSTRUCTION COMPANY, INC.,

Plaintiff and Respondent,

vs.

STATE ROAD COMMISSION OF UTAH,

Defendant and Appellant.

CASE NO.

BRIEF OF

APPEAL FROM

JUDICIAL

SALT LAKE

THE HONORABLE

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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STATE ROAD COMMISSION OF UTAH,	:	
Defendant and Appellant.	:	

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BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This case involves an award of interest by the District Court on principal amounts determined to be due and owing by appellent to respondent on three highway construction contracts. The determination of the principal amounts owed was made through arbitration proceedings which reserved the question of interest, as a question of law, for decision by the District Court.

DISPOSITION IN LOWER COURT

Respondent filed a motion for partial summary judgment seeking interest on principal amounts which were previously determined to be due and owing to respondent in arbitration proceedings. The District Court granted the motion and entered partial summary judgment against appellant for interest in the amount of $21,532.24.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the decision of the District Court affirmed.

STATEMENT OF FACTS

The Statement of Facts contained in appellant's Brief is incomplete and not sufficiently detailed or precise to adequately and accurately present the questions to be decided. Therefore, respondent will state the facts. For convenience, the parties will be referred to by the trial court designations where appellant was defendant and respondent was plaintiff.

Prior to January 29, 1971 plaintiff and defendant entered into a number of contracts for the construction of highways in various parts of the State of Utah. (R. 269). Plaintiff had filed suit against defendant in the Third

Judicial District Court, in and for Salt Lake County, to collect money it claimed was owed to it by defendant under several of these contracts, including the contracts covering the three projects involved in this appeal. (R. 269).

The three contracts involved here were designated as Poison Springs Wash to Trachyte Junction, (herein called Trachyte project); Hanksville to Poison Springs Wash, (herein called Hanksville project); and Perry to three miles west of Brigham City, (herein called Brigham City project).

Under the specifications covering the three contracts, it was defendant's obligation to accurately measure all quantities of work performed by plaintiff and to pay plaintiff in full at the time defendant submitted the final estimate invoices on each of the projects. Section 1-9.1 of the specifications provided:

> "Measurement of Quantities. All work completed under the contract shall be measured by the Engineer according to United States Standard Measure." (R. 264).

Section 1-9.8 of the specifications provided:

> "Acceptance and Final Payment. When the final inspection and final acceptance have been duly made, a final estimate will be prepared by the Engineer, based on the actual quantities of authorized work

done under each item scheduled in the proposal ... which estimate will show the total value of the completed work and the final payment due the contractor." (R. 264).

In the Complaint, plaintiff claimed that defendant failed to correctly measure and pay for the work done by plaintiff. (R. 269). The Complaint also demanded payment of interest on the principal amounts owing to plaintiff.

On January 29, 1971 plaintiff and defendant entered into an Arbitration Agreement under the terms of which the parties agreed to submit plaintiff's claims for quantities of work performed and money due for such work to an arbitration panel. (R. 269-273). However, all questions of law were reserved to be heard and decided by the Third District Court in paragraph Eighth of the Arbitration Agreement, which provided, in part:

> "Cox and Highway Department reserve all questions of law to be heard by a District Judge of the Third Judicial District in and for Salt Lake County as part of said suit, Civil No. 177519. The rulings by said District Judge on such questions shall be binding on any award made by the Arbitration Board, except that such decisions may be appealed by either party hereto. Said questions of law shall be heard by said District Judge following the arbitration hearings." (R. 272).

Proceedings under the Arbitration Agreement commenced, and after dealing with several claims on which liability was admitted by defendant, or the claims dropped by plaintiff,

and after extensive discovery proceedings and investigation and re-measurement of work at the project sites, plaintiff and defendant were able to resolve most of the factual issues between themselves regarding the quantities of work done by plaintiff. They entered into agreements on the three projects setting forth the quantities of work done by plaintiff on each project for which defendant would pay and the dollar amounts to be paid.

Defendant's brief erroneously implies that the claims on the three contracts were settled by lump sum payments. To ascertain the real nature of the settlements it is necessary to examine in some detail plaintiff's claims and the settlement agreements entered into, as well as statements in the record by defendant's counsel as to what matters were settled. Each claim and each settlement will be examined separately.

Claims Presented in Arbitration.

Brigham City project. Plaintiff submitted a claim for payment for specific quantities on 15 separate contract items. Included were claims for specific quantities of work done at specific locations on the project site under contract item 3, roadway excavation; contract items 34(I), 41(I), 52(I) and 63(I), excavation for structures; contract

items 26(F) and 31(I), spreading topsoil; contract items 19(F) and 23(I), plant mix seal coat; contract item 10(I), concrete pipe; contract items 11(F) and 12(I), steel pipe; improperly assessed flagging charges; improperly assessed penalty; and force account work for correction of an elevation error. (R. 323-325). The claim on each of these items represented a claim for a principal amount owing under the contract. In its response defendant replied separately to each item on which claim had been made. Under contract items 41(I), 52(I), 63(I) and 34(I) (excavation for structures), defendant admitted that it had not paid for the wingwall excavation and that money was owed to plaintiff for this excavation but the amount had not yet been computed. Under contract items 26(F) and 31(I) (spreading topsoil), defendant admitted it had made errors in calculations and that it owed plaintiff $1,724.48, representing 2,299.3 cubic yards at the contract unit price of 75 cents per cubic yard. On the claim for improper flagging charges, defendant admitted that it had charged plaintiff for railroad flagging charges incurred by defendant during the period of about two years before plaintiff's contract commenced. Defendant stated it would determine

the amount of the flagging charges improperly assessed against plaintiff. On the force account claim, defendant admitted it owed plaintiff $571.00 on that item. Defendant denied liability on six items and stated it would have to determine its liabiltiy on two other items. (R. 323-325). When the computations were made the amount defendant admitted it owed was $19,395.43.

Hanksville project. Plaintiff submitted a claim for payment for specific quantities of work performed on 18 separate contract items. Included in the claim on one contract item, roadway excavation, was a breakdown on the quantity of work done by plaintiff in fifteen separate areas. Also included were claims for specific work done under contract item 5, mechanical tamping; contract item 6, imported borrow; contract item 7, compaction; contract item 8, class A overhaul; contract item 9, class B overhaul; contract item 20, special pipe; contract item 27, untreated base course; contract item 28, bituminous material; contract item 33, small ditch excavation; contract item 34, loose rip rap; force account work for refinishing slopes at five locations; force account work for repairing an adjacent roadway; and force account work for repairing a drainage

area. (R. 277-281). The claim on each of these items represented a claim for a principal amount due under the contract. In its response defendant answered the claims on each of the contract items separately.

Trachyte project. Plaintiff submitted a claim for payment for specific quantities of work performed on 25 separate contract items. On contract item 3, roadway excavation, work done and not paid for in 19 separate locations on the project was set forth in detail. Also included in detail were claims for specific work done under contract item 5, mechanical tamping; contract item 6, compaction; contract item 7, class A overhaul; contract item 8, class B overhaul; contract items 10 and 12, metal pipe; contract items 16, 17 and 19, structural pipe; contract item 25, bituminous material; contract item 29, small ditch excavation; contract item 30, loose rip rap; and 11 different items of force account work. The claim on each of these items represented a claim for a principal amount due under the contract. In its response defendant replied to each of the separate items of the claim.

Following extensive discovery proceedings, plaintiff and defendant reached agreement on the quantities of work

done by plaintiff on most of the contract items involved.

Settlement Agreements.

Brigham City project. Under the stipulation settling plaintiff's principal claims on this project, defendant paid for 8,750 cubic yards of roadway excavation under contract item 3 at the contract price of 40 cents per cubic yard for payment of $3,500.00. Under contract items 41(I), 52(I), 63(I) and 34(I), excavation for structures, defendant paid for 467.95 cubic yards at the contract price of $3.00 per cubic yard for a payment of $1,403.85. Under contract items 26(F) and 31(I), spreading topsoil, defendant paid for 2,298.67 cubic yards at the contract price of 75 cents per cubic yard, making a payment of $1,724.00. Plaintiff dismissed its claims under contract items 19(F), 23(I), 10(I), 11(F) and 12(I). On the claim of improper flagging charges, defendant paid $15,696.58 for flagging charges improperly assessed against plaintiff. On the improper assessment of a penalty, defendant paid $2,413.29, the full amount it had improperly assessed against plaintiff. Defendant paid $571.00 on the force account item for correction of an elevation error. On the claim on contract item 44, site grading, defendant paid $3,500.00 for work done by plaintiff. (R. 274-276). The amount paid was the sum

of the individual principal amounts owed and totaled $28,808.72. In its response to plaintiff's claim defendant had originally admitted liability on eight of the 11 contract items on which payment was finally made. Payment on the eight contract items admitted from the outset was $19,395.91, with $9,412.81 paid on contract items originally disputed. (R. 323-325).

Hanksville project. Under the stipulation settling plaintiff's principal claims on this project, defendant paid under contract item 3 for 13,327.4 cubic yards of roadway excavation at the contract price of 28 cents per cubic yard for a payment of $3,731.68. Under contract item 5, mechanical tamping, defendant paid for 184.6 hours at the contract price of $5.45 per hour for a payment of $1,006.07. On contract item 6, imported borrow, defendant paid for 2,619 cubic yards, which at the contract price amounted to $1,833.30. Payment made under contract item 7, compaction, was broken down into 5,833 cubic yards of precompaction for $233.32 and 15,946.3 cubic yards of compaction for $637.85. Under contract item 33, small ditch excavation, defendant paid for 923.5 cubic yards for a payment of $1,385.26. Contract item 34 involved loose

rip rap and defendant paid for 1,133.3 cubic yards for a payment of $3,399.99. Under the force account claim, defendant paid for refinishing slopes at seven separate locations with hourly rates for equipment and labor totaling $156.00 at the first location, $52.00 at the second location, $100.00 at the third location, $75.00 at the fourth location, $2,124.00 at the fifth location and $400.00 at the sixth and seventh locations. Also under the force account claim defendant paid for three pieces of equipment for varying lengths of time for blading an adjacent road for a payment of $2,124.00. (R. 277-281).

Trachyte project. This agreement is reflected in a letter from defendant's counsel to defendant. (R. 315-319). The letter sets forth the amounts to be paid on each item of the claim. Payment was made under 17 different contract items. Under contract item 3, roadway excavation, claim was made for work in 19 separate areas. Defendant paid for work in 18 of those areas. The following is an example of how the letter spelled out the areas where payment was due for roadway excavation:

" CLAIM	AMOUNT CLAIMED IN CONTRACTORS CLAIM	AMOUNT REQUESTE
CONTRACT ITEM NO. 3		
Area No. 1, Channel Change 125 feet left of station 1398+00	399.49	399.49
Area No. 2, Channel Change 75 feet right of station 1122+00	1,963.62	1,963.62
Area No. 3, Channel Change 125 feet left of station 1199+00	407.40	147.45

* * * * * "

(R. 315).

The total paid for work under contract item 3, roadway excavation was $11,877.61. On contract item 5, mechanical tamping, defendant paid $329.73. On contract item 6, precompaction, defendant paid $191.92. Defendant paid $1,002.69 under contract item 25, bituminous material RC70 and $404.25 on contract item 29, small ditch excavation. On contract item 30, loose rip rap, defendant paid $1,704.96. On nine separate claims for work under force account, such as claims for cleanup of water damage, replacement of pipe and blading another highway, defendant paid $932.00, $167.75, $190.40, $1,334.12, $582.58, $105.45, $1,000.00, $745.48 and $441.71, respectively. (R. 315-318).

In each settlement agreement the payment made by defendant was for specific quantities of work done by plaintiff on specific contract items, and the payments represented principal amounts owing under the contract. There was no lump sum settlement of plaintiff's claims.

On the question whether the settlements were intended to include plaintiff's claim for interest, defendant's lawyers each made a statement. Mr. Strong, who negotiated the settlement of the Hanksville and Trachyte claims, said in his affidavit:

> "4. Affiant further states that at the time said stipulation was entered into, to wit, February 15, 1974, it was his understanding that the defendant was not obligated to pay interest on unliquidated claims and the subject of interest was not considered by the parties for that reason. Affiant further states that this understanding concerning interest was obviously shared by plaintiff's counsel." (Emphasis added). (R. 314).

At the hearing on the Motion for Summary Judgment, Mr. Ford, who represented defendant in the settlement of the Brigham City claim, admitted that the question of interest was never considered by the parties in negotiating and settling the claims. (R. 334).

Plaintiff had demanded payment of interest in its

Complaint in the District Court and in the Arbitration Agreement it had reserved all questions of law for decision by the District Court. As to when the questions of law where to be presented to the District Court, the Arbitration Agreement in Paragraph Eighth provided:

> ". . . Said questions of law shall be heard by said District Judge following the arbitration hearings." (Emphasis added). (R. 272).

The arbitration hearings have not yet been completed (R.251), but defendant made no objection to the Motion of Summary Judgment for payment of interest being heard prior to the conclusion of the arbitration hearings.

The Arbitration Agreement provided that plaintiff's claims be filed within 90 days. However, the full context of agreement provided: (1) within 10 days all of the surveys, original and final cross sections, contour designs, cut volumes, mass haul diagrams, cross section rolls and field notes on all of the projects would be examined and copied; (2) within 90 days plaintiff's claims would be submitted; (3) within 60 days after submission of plaintiff's claims, defendant would submit its responses with full documentary evidence and supporting data; and (4) within 60 days after filing of defendant's responses the arbitration

board would hold its hearing and rule within 30 days thereafter. (R. 270-272). None of these provisions were adhered to.

The materials were too voluminous to examine and copy within 10 days. Plaintiff could not submit its claims within 90 days. Defendant's counsel reported to defendant that on the Trachyte project alone extensive depositions were taken along with several field inspection trips and thorough investigation of documentation. (R. 315). Defendant could not submit its responses within 60 days. (R. 249-250). When submitted the responses did not contain full documentation and supporting data. (R. 323-326). The arbitration board could not hold its hearings within 60 days after defendants response and rule within 30 days thereafter. (R. 250).

All of the time requirements of the first five paragraphs of the Arbitration Agreement were waived by the parties. The arbitration hearings proceeded without objection.

The stipulations on the Brigham City claim and the Hanksville claim bear the respective headings "Before the Arbitration Board" and "Before the Arbitration Panel".

(R. 274, 277). The letter evidencing the settlement of the Trachyte claim bears the reference above the salutation "Re: Cox Arbitration". (R. 315). There is no evidence that either of the stipulations or Mr. Strong's letter were intended to supercede the Arbitration Agreement. The record contains no evidence of any detriment caused to defendant, and defendant did not present the defense of estoppel to the District Court. (R. 333-339).

It is uncontested that the amount of interest from the due date to the date paid totals $21,532.24 for the three claims.

ARGUMENT

POINT I

THERE WAS NO ACCORD AND SATISFACTION BETWEEN THE PARTIES ON THE DISPUTE INVOLVING PLAINTIFF'S CLAIM FOR INTEREST.

The law defining an accord and satisfaction is clear. In Ralph A. Badger Co. v. Fidelity Building and Loan Association, 94 Utah 97, 75 P.2d 669, the Utah Supreme Court said:

> "It is stated in 1 Am. Jur. p. 217, Sec. 4, that: 'The discharge of claims by way of accord

and satisfaction is dependent upon a contract express or implied; and it follows that the essentials necessary to valid contracts generally must be present in a contract of accord and satisfaction. Therefore, the following elements are essential: (1) a proper subject matter, (2) competent parties, (3) an assent or meeting of the minds of the parties, and (4) a consideration.'"

See also Browning v. Equitable Life Assurance Society of U.S., 94 Utah 532, 72 P. 2d 1060.

The law is well established that parties having two or more matters in dispute may have an accord and satisfaction as to one of the matters without affecting the others. In Blockhead, Inc., v. The Plastic Forming Company, Inc., 402 F. Supp. 1017, D.C., D. Conn., the court said:

"Defendant submits that the settlement reached in January and February of 1970 was a complete accord and satisfaction with respect to all complaints concerning the wiglet case and thus bars any recovery by plaintiff. The court finds that the settlement covered only specified defects and does not constitute an accord with respect to unmentioned problems regardless of when they appeared.

* * * * *

"A settlement accepted with respect to injuries that have already occurred will not constitute an accord and satisfaction with respect to damages that have not yet accrued. (citing cases). Nor will a settlement with respect to some issues of a dispute constitute an accord and satisfaction of the other issues not explicitly included within the settlement provisions." (Emphasis added).

Similarly, in Pierson v. Harrington, 138 Ga. App. 463, 226 S.E. 2d 299, the court said:

> "An accord and satisfaction may be made between the parties pro tanto...the parties may make an accord and satisfaction or what in law amounts to an accord and satisfaction, as to one or more of these demands without affecting the others.
>
> * * * * *
>
> "...Where there is no agreement to settle all disputes arising from the contract a satisfaction does not result, although money is demanded and received."

Again, in Redman Development Corp. v. Pollard, 131 Ga. App. 708, 206 S.E. 2d 605, it was held:

> "The settlement of the extra work of $60,089.27 for $32,000 was in the nature of an accord and satisfaction of this part of the contract when the letter agreement and change order was signed by the parties, although $3,200 was withheld pending completion of the contract. However, this was not an accord and satisfaction of the entire transaction between the parties, but was limited to the items going to make up the $60,089.27 above mentioned." (Emphasis added).

Applying these rules to the facts of the instant case it is apparent that there was no accord and satisfaction on plaintiff's claim to interest. The only subject matter of the stipulation and the agreement set forth in Mr. Strong's letter was payment of principal amounts owed for specific quantities of work performed by plaintiff under

various contract items. (R. 274-276, 277-281, 315-319). The parties had a meeting of the minds only on payment for such quantities of work which were payment of principal. (R. 274-276, 277-281, 315-319). Mr. Strong said that the subject of interest was not considered by the parties in agreeing on the quantities of work to be paid for on the Hanksville project and Trachyte project. (R. 314). Mr. Ford admitted that the question of interest was never considered by the parties in negotiating and settling the principal claims on the Brigham City project. (R. 334).

In its Complaint in the District Court plaintiff demanded that defendant pay the principal amounts owing and interest on such principal amounts. There were two matters in dispute between plaintiff and defendant: first, defendant's liability on the principal claims and, second, defendant's liability to pay interest. Under the Arbitration Agreement the first dispute, that of defendant's liability to pay for the principal claims, was submitted to the arbitration proceedings while the second dispute, that of defendant's liability to pay interest, was reserved as a question of law, for decision by the Third District Court. (R. 269-273). An accord and satisfaction was

reached as to the claims for principal payments. However, this accord and satisfaction as to the claims for payment of principal does not act as an accord and satisfaction on the second dispute, plaintiff's claim for payment of interest.

The elements requiring an agreed subject matter and a meeting of the minds set out in Ralph A. Badger Co. v. Fidelity Building and Loan Association, supra, and the express rules stated in Pierson v. Harrington, supra; Redman Development Corp. v. Pollard, supra; and Blockhead, Inc., v. The Plastic Forming Company, Inc., supra, support the trial court's decision that there was no accord and satisfaction as to plaintiff's claim for interest.

POINT II

THE QUESTION OF PLAINTIFF'S RIGHT TO INTEREST WAS A QUESTION OF LAW RESERVED FOR DECISION BY THE DISTRICT COURT.

In its Complaint filed in the District Court, plaintiff demanded payment of interest. The Arbitration Agreement in Paragraph Eighth states, in part:

> "Cox and Highway Department reserve all questions of law to be heard by a District

Judge of the Third Judicial District in and for Salt Lake County as part of said suit, Civil No. 177519. . ." (R. 272).

It is well established that whether a party is entitled to payment of interest is a question of law. In Baker Lumber Co., v. A. A. Clark Co., 53 Utah 336, 178 Pac. 764, a school board entered into a contract for the construction of a building. At the time the building was completed the school board failed to make payment. The trial court refused to compel the school board to pay interest. The Utah Supreme Court reversed that decision and required that interest be paid at the legal rate from the date due until paid. The Court said:

> "...It is not a question of the school board agreeing to pay interest either by warrant or otherwise. It is a question of its duty on one side and the right of a creditor on the other. It is a right that the statute gives to any one who has money due and who is unable to collect the same. The school board in this case accepted the building. Presumably it had the use of it for the purpose for which it was erected and had continued to use it since it was accepted. Public policy, it seems to us, should require a public corporation to meet its obligations legally authorized whenever due, and upon failure to do so that it be subjected to the same duty as private individuals - to reimburse the creditor for his forebearance or delay in receiving what is his due." (Emphasis added).

In Uinta Pipeline Corporation v. White Superior Co.,

546 P. 2d 885, the trial court refused to allow interest prior to the date of judgment. The Utah Supreme Court reversed and ruled that pre-judgment interest should have been allowed as a matter of law. Recently this court applied the rule to defendant herein in the case of Jack B. Parson Construction Company v. State of Utah, 552 P. 2d 107, where the Utah State Road Commission was required as a matter of law to pay pre-judgment interest on principal amounts found due under a highway construction contract.

POINT III

A. THE CONTENTION THAT INTEREST SHOULD NOT BE ALLOWED BECAUSE DEFENDANT HAD TRADITIONALLY REFUSED TO PAY INTEREST IS WITHOUT MERIT.

B. THERE IS NO BASIS IN FACT OR LAW THAT WOULD PERMIT TERMINATING INTEREST AS OF APRIL 29, 1971.

Defendant's second argument consists of two parts which will be addressed separately.

A. Defendant argues in its brief that:

> "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." (Appellant's Brief, page 8).

From this statement defendant argues that since the state traditionally had refused to pay interest at the time the settlement agreements were entered into, it should not have to pay interest now on the principal amounts that were due and owing to plaintiff.

Defendant's argument fails to consider the facts of this case relative to plaintiff's claim for interest and the applicable law.

Plaintiff filed a Complaint in the District Court in which it demanded payment of the principal sums owing and interest thereon. The arbitration proceedings were entered into to find the amount of principal owing to plaintiff for work it had done. The Arbitration Agreement in paragraph Eighth specifically reserved all questions of law for decision by the District Court. The agreement states:

> "Cox and Highway Department reserve all questions of law to be heard by a District Judge of the Third Judicial District in and for Salt Lake County as part of said suit, Civil No. 177519..." (R. 272).

As demonstrated above in Point II, the question of plaintiff's right to receive interest was a question of law.

Furthermore, both of defendant's counsel, Mr. Strong and Mr. Ford, admitted that the subject of interest was

never discussed or considered by the parties in the settlement negotiations. (R. 314, 344).

In summary, the facts are that plaintiff made claim for interest in the District Court action. An Arbitration Agreement was entered into to determine the principal amounts owing and expressly reserved plaintiff's claim for interest for decision by the District Court. The settlements of the claims for principal payment were entered into, and in those negotiations the question of plaintiff's right to interest was never considered. Pursuant to the Arbitration Agreement plaintiff submitted its claim for interest as a question of law to the District Court.

The fact that defendant misapprehended the law cannot affect plaintiff's legal right to interest. Plaintiff asserted that right from the outset, reserved it for decision by the District Court, did not settle its claim for interest in settling the claims for principal, and pursued its right to payment of interest in the District Court.

The law is clear that the right to payment of interest is a legal right which attaches upon the debtor's failure to pay money when it is due and owing. As noted in Baker

Lumber Co. v. A. A. Clark Co., supra:

> "It is not a question of the school board agreeing to pay interest either by warrant or otherwise. It is a question of its duty on one side and the right of a creditor on the other. It is a right that the statute gives to any one who has money due and who is unable to collect the same."

In Puget Sound Pulp and Timber Co. v. O'Reilly, 239 F. 2d 607, C.A. Wash., the court said:

> "Interest on money detained after it is due and payable is recoverable as a matter of legal right."

As noted in Baker, supra, it is not a question of defendant agreeing to pay interest, it is an obligation imposed by law.

Under the facts and law the claim that defendant had traditionally refused to pay interest cannot defeat plaintiff's legal right to receive interest.

B. Defendant also argues in its second point that interest should be terminated as of April 29, 1971, 90 days after the Arbitration Agreement was entered into, because plaintiff had not filed its claims with the arbitration board within that time.

There is no basis in fact, law or equity in this position. The interest attached to money defendant owed to plaintiff. Defendant had the obligation under section 1-9.1 and section 1-9.8 of the contract to accurately

measure the quantity of work done by plaintiff and to pay plaintiff in full for that work. (R. 264). Defendant could have paid plaintiff what it owed at any time and by that payment terminated the interest.

Defendant's argument ignores other material and relevant facts. The first five paragraphs of the Arbitration Agreement contain time requirements. (R. 270-272). The first paragraph required that all original and final surveys, original and final cross sections, cut volumes, mass haul diagrams, cross section rolls and field notes on nine highway construction projects be examined and copied within 10 days. This proved to be impossible because of the sheer volume of material. The second paragraph required that plaintiff submit its claims in writing with full documentation within 90 days after receipt of the documents described in the first paragraph. Plaintiff was unable to submit its claims within the 90 day period, and defendant made no objection. The third paragraph required defendant to submit its response in writing with full documentation and supporting data within 60 days after receipt of plaintiff's claims. Defendant was not able to comply with this provision. (R. 249-250). In fact, defendant's response

on the Brigham City claim not only fails to contain full documentation and supporting data, but even on eight contract items on which it admitted it owed plaintiff money it had not yet computed the amounts on five of those items and on the other three admitted owing the full sum claimed by plaintiff. (R. 323-326). This response was filed May 31, 1974 (R. 326), while the final estimate invoice had been delivered October 5, 1967. (R. 266). On the five items which it admitted it owed but hadn't determined the amount, defendant had gone almost seven years without computing the amounts it owed on contract items it admitted owing. In addition, defendant had gone seven years without paying the other three items upon which it admitted owing the full amount claimed by plaintiff. The total amount owed on these admitted items was $19,395.43. (R. 274-276).

The fourth and fifth paragraphs require the arbitration board to hold a hearing within 60 days after receipt of defendant's response and render a decision within 30 days after the hearing. These time requirements were not adhered to. (R. 250).

None of the time requirements in the Arbitration Agreement were adhered to and all were waived by the parties. No objection was made by either side at the time.

The reason for the inability of all of the parties to meet the time requirements of the agreement is set forth in Mr. Strong's letter to defendant dated February 3, 1973. This letter was written two years after the Arbitration Agreement was entered into and contains no objection or reference to any of the time provisions of the agreement. The letter deals with only one of the nine contracts subject to the Arbitration Agreement, and states with reference to that one:

> "Extensive depositions were taken on the project which I have reported to you along with several field inspection trips and an arbitration hearing on three of the claims .... However, the following claims have been thoroughly investigated and reviewed by myself and the project engineer . . ." (R. 315).

There is no legal, factual or equitable basis for terminating interest at April 29, 1971. As noted in the cases above, interest runs from the time money is due until it is paid.

POINT IV

THE SETTLEMENT AGREEMENTS DO NOT CREATE AN AMBIGUITY.

Defendant argues that the settlement agreements may create an ambiguity as to whether they were intended to settle plaintiff's claim for interest. Defendant bases this argument on the fact that the agreements fail to

specifically refer to interest.

The Arbitration Agreement and settlement agreements have been examined in some detail above. As noted in Big Butte Ranch, Inc., v. Marjorie R. Holm, et al, Case No. 14630, this court stated:

> ". . .to ascertain the meaning of the agreement the court should first examine the language of the instruments and accord to it the weight and effect which it may show was intended . . . ."

There is no ambiguity in the language of the agreements. Plaintiff had demanded payment of principal amounts owed and interest thereon in its Complaint in District Court. The Arbitration Agreement was entered into to resolve plaintiff's claim for principal amounts owing under the contracts, and as quoted above, in paragraph Eighth the parties specifically reserved all question of law for decision by the District Court. (R. 272). Plaintiff's right to payment of interest was a question of law so reserved and was never involved in the arbitration proceedings. Defendant's two attorneys both stated that interest was never considered by the parties in negotiating the settlements. (R. 314, 344).

The settlement agreements were entered into pursuant to the Arbitration Agreement and as part of the arbitration

proceedings. The two stipulations bear the respective headings "Before the Arbitration Panel" (R. 277) and "Before the Arbitration Board". (R. 274). The letter reflecting the agreement on the Trachyte project bears the reference above the salutation "Re: Cox Arbitration". (R. 315). The content of this letter is nearly identical in substance with the content of the two stipulations and, contrary to the statement in defendant's brief, this letter was drafted by Mr. Strong, an attorney for defendant.

The settlement agreements are very specific with reference to exactly what they settle between the parties. For example, on two typical items the Brigham City stipulation states:

"EXCAVATION FOR STRUCTURES, UNCLASSIFIED

"Disposition	Amount of Payment
"Defendant will pay for an additional 467.95 cubic yards at the contract unit price of $3.00 per yard.	$1,403.85

SPREADING TOPSOIL

"Disposition	Amount of Payment
"Defendant will pay for an additional 2,298.67 cubic yards at the contract unit price of 75 cents per cubic yard. (R. 274-275).	$1,724.00"

Every single item for which defendant paid under the three settlement agreements was set forth in the same kind of detail. (R. 274-276; 277-281; 315-319).

Each item paid for in the settlement agreements represented a specific quantity of work done by plaintiff under the respective contracts and represented principal payments due to plaintiff. Defendant quotes a cover letter on the Brigham City stipulation which states:

> "I believe the enclosed stipulation sets forth our settlement on the Brigham City claim . . . .(R. 327).

The stipulation which was enclosed clearly was a settlement of plaintiff's principal claims on the contract items set forth in the stipulation. (R. 274-276). As noted above, plaintiff's claim for interest had been reserved for decision by the Third District Court.

The proceedings were carried out exactly as contemplated by the Arbitration Agreement. The settlements of the principal claims were made in the arbitration proceedings and plaintiff's claim for interest was decided by the District Court.

POINT V

THE THREE SETTLEMENT AGREEMENTS WERE ENTERED

INTO AS PART OF THE ARBITRATION PROCEEDINGS AND DID NOT SUPERCEDE THE ARBITRATION AGREEMENT.

The three settlement agreements were entered into as part of the arbitration proceedings. As noted above, the stipulation on the Brigham City project bore the heading "Before the Arbitration Board" (R. 274); the stipulation on the Hanksville project had the caption "Before the Arbitration Panel" (R. 277); and the letter evidencing the agreement on the Trachyte project had the reference "Re: Cox Arbitration". (R. 315).

Since the settlement agreements were specifically part of the arbitration proceedings there is no factual or legal basis for defendant's claim that the Arbitration Agreement was superceded.

POINT VI

DEFENDANT FAILED TO PRESENT ITS CLAIM OF ESTOPPEL TO THE DISTRICT COURT AND IS THEREFORE PRECLUDED FROM RAISING THE QUESTION ON APPEAL.

Defendant failed to present its claim of estoppel to the District Court. (R. 333-339). Utah law provides that a party cannot present a claim or defense on appeal to the Supreme Court which has not first been presented to the trial court for its decision. In the case of In re

Jones' Estate, 99 Utah 373, 104 P. 2d 210, the court said:

> "Administratrix raises for the first time in her appeal the Statute of Limitation and laches as defenses against the tax. The Statute of Limitation and laches are affirmative defenses which must be pleaded. (citing cases). It appears that these defenses were never raised in the district court nor even referred to in the assignment of error. They cannot now be raised on appeal."

Estoppel is a defense which must be pleaded. Collett v. Goodrich, 119 Utah 662, 231 P. 2d 730. In Mathis v. Madsen, 1 Utah 2d 46, 261 P. 2d 952, the defense of res judicata was presented for the first time on appeal. The court refused to consider the defense and said:

> "... nor is it our perogative to determine the question of res judicata before it is presented to a lower court."

Similarly, in Radley v. Smith, 6 Utah 2d 314, 313 P. 2d 465, the court refused to consider the defense of illegality of a contract which was not raised in the trial court.

The question of estoppel is not properly before the Court on this appeal and Point V of defendant's brief should be disregarded.

POINT VII

PLAINTIFF IS NOT ESTOPPED FROM ASSERTING ITS CLAIM FOR INTEREST.

Plaintiff is not estopped from asserting its claim for interest herein. Plaintiff followed the express provisions of the arbitration proceedings in presenting its claim for interest on these projects. Claim was made for payment of interest in the Complaint in the District Court. In the Arbitration Agreement the decision on the claim for interest was reserved to the District Court. As to the timing of the submission of the claim for interest to the District Court, paragraph Eighth of the Arbitration Agreement provided:

> ". . .Said question of law shall be heard by said judge following the arbitration hearings." (R. 272).

The arbitration hearings are not yet complete. (R. 251). Defendant could have argued in District Court that plaintiff's motion for the award of interest was premature, but it failed to do so.

The fundamental element of estoppel is detriment or injury to the party claiming the estoppel. Easton v. Wycoff, 4 Utah 2d 386, 295 P. 2d 332; Migliaccio v. Davis, 120 Utah 1, 232 P. 2d 195; and Cook v. Cook, 110 Utah 406, 174 P. 2d 434. There is no evidence of any injury or detriment to defendant arising from plaintiff's claiming interest. The money paid to plaintiff was admitted by defendant's counsel

to be solely for principal amounts due and owing under the contract which defendant was liable to pay.

It is difficult to understand defendant's claim of estoppel against plaintiff's claim for interest. Estoppel is based upon equity. The record shows that on the Brigham City project alone defendant withheld from plaintiff the principal sum of $19,395.43, which it admitted from the outset is owed plaintiff for a period of nearly seven years. (R. 274-276, 323-326). Defendant cannot claim the protection of equity against paying interest on this sum.

There is no factual or legal basis for the defense that plaintiff is estopped from asserting its claim for interest.

CONCLUSION

It is respectfully submitted that the Partial Summary Judgment entered by the District Court should be affirmed.

Respectfully submitted,

John F. Piercey
Attorney for Respondent

CERTIFICATE OF MAILING

I certify that two copies of the foregoing Respondent's Brief were served by mailing, postage prepaid, to Leland D. Ford, attorney for Appellant, Attorney General's Office, 115 State Capitol Building, Salt Lake City, Utah 84114, this _____ day of January, 1978.

_____

John F. Piercey