2001

J. P. Koch, Inc. v. JC Penney Company : Brief of Respondent

Utah Supreme Court

Richard H Moffat; John L Young; Attorneys for Plaintiff-Respondent.
Wallace D Hurd; Attorney for Defendant-Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

J. P. KOCH, INC.,
Plaintiff-Respondent,

vs.

J. C. PENNEY COMPANY,
Defendant-Appellant.

Case No. 13850

BRIEF OF RESPONDENT

Appeal from a Judgment of the Third District Court in and for Salt Lake County, State of Utah
The Honorable Ernest E. Baldwin, Judge

RICHARD H. MOFFAT
JOHN L. YOUNG
9th Floor Tribune Building
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Respondent

WALLACE D. HURD
1011 Walker Bank Building
Salt Lake City, Utah 84111
Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

STATUTES CITED

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

J. P. KOCH, INC.,
Plaintiff-Respondent,

vs.

J. C. PENNEY COMPANY,
Defendant-Appellant.

Case No. 13850

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is a suit to recover money allegedly owing for labor and material furnished for the improvement of property owned by the appellant pursuant to a construction contract, said action being based upon the provisions of Section 14-2-1 U.C.A. (1953 as amended) *et. seq.*

DISPOSITION IN LOWER COURT

The appellant's statement as to the disposition of the lower court is essentially correct.

RELIEF SOUGHT ON APPEAL

The respondent seeks to have the Judgment entered by the lower court against the appellant, J. C. Penney Company, sustained.

STATEMENT OF FACTS

The respondent agrees with the Statement of Facts contained in the appellant's Brief in part. However, the Statement of Facts should include additional information. It is true that on or about September 18, 1970, the bond required by the contract between the appellant and Skyline Construction Company, the general contractor, was deleted from said general contract. This deletion took place after the appellant requested of Skyline Construction the amount of deduction that would be made if the bond were deleted. It was determined that a deduction of approximately $11,000.00 in the cost of the project could be made if the bond were deleted and as a result the appellant deleted the bond requirement. (Peterson deposition pages 3 and 4, lines 7 through 7). The respondent was not notified of the deletion of the bond requirement.

It is true that during the period of construction, progress payments were made by the appellant to the general contractor from time to time as work progressed. The payment requests submitted by Skyline to the appellant were accompanied usually by some type of lien waiver from the various subcontractors and material-

men on the job. The lien waivers with which the Court is here concerned are designated as pages 95 through 104 inclusive, of the Record on Appeal. There is no dollar figure nor date appearing on the first waiver. (R. 95). The same is true with the second waiver. (R. 96). Page 97 of the Record reflects the first lien waiver wherein a particular dollar figure is indicated. Again, however, this waiver bears no date. It does however, speak in terms of labor and materials furnished on or before April 30, 1971. The next lien waiver is dated May 31, 1971. (R. 98). The figures contained in said lien waiver do not in any way correspond or conform with the figure indicated on the prior lien waiver. The next lien waiver is also dated May 31, 1971. (R. 99). It reflects a different amount received as of May 31, 1971 than does the previous one. The next lien waiver is dated June 30, 1971. (R. 100). The only blank filled in on that lien waiver is a figure for the total amount received to the date of June 30, 1974. The next lien waiver is dated August 8, 1971. (R. 101). The figures contained in such lien waiver are inconsistent with the figures in the prior lien waivers. The discrepancy between these two waivers is the sum of $54,793.20. The next lien waiver is dated August 27, 1971. (R. 102). The figures contained in this lien waiver are inconsistent with all those prior thereto. This lien waiver in fact reflects a decrease in the figure representing the total amount received from the prior lien waiver. The next lien waiver bears Peterson's stamp date of October 13, 1971. (R. 103). Otherwise it is undated. The

figures contained in said lien waiver are inconsistent with any of the lien waivers prior thereto. The final lien waiver bears the date of October 31, 1971. (R. 104). Again, the figures contained therein are inconsistent with the figures contained in all of the prior lien waivers.

ARGUMENT

POINT I

THE DISTRICT COURT WAS CORRECT IN ITS FINDING THAT UNDER THE CIRCUMSTANCES OF THIS CASE THE APPELLANT IS LIABLE TO THE RESPONDENT BY VIRTUE OF THE PROVISIONS OF SECTION 14-2-1 U.C.A. (1953 AS AMENDED) *ET. SEQ.*

The appellant asserts that it is indebted to the respondent in the sum of only $11,317.02. The appellant bases this assertion upon the lien waiver dated October 31, 1971. (R. 104). The appellant asserts that it paid the sum of $579,608.34 to Skyline Construction Company as payment for work performed by the respondent. The prime contractor, Skyline Construction Company failed to pay a total sum of $58,308.61 exclusive of interest to the respondent.

Under the circumstances of this case, it is clear that the appellant is liable to the respondent in the sum

of $56,147.97 as a matter of law. Section 14-2-1 U.C.A. (1953 as amended) provides as follows:

> "The owner of any interest in land entering into a contract, involving $500.00 or more, for the construction of any building structure or improvement upon land shall, before any such work is commenced, obtain from the contractor a bond in the sum equal to the contract price with good and sufficient sureties conditioned for the faithful performance of the contract and prompt payment for material furnished and labor performed under the contract. Such bond shall run to the owner and to all other persons as their interest may appear; any person who furnished materials or performed labor for or upon any such building, structure, or improvement, payment for which has not been made, shall have a direct right of action against the sureties upon such bond for the reasosable value of the materials furnished or the labor performed, not exceeding, however, in any case, the prices agreed upon; which right of action shall accrue forty days after the completion, or abandonment, or default in the performance of the work provided for in the contract."

Section 14-2-2 U.C.A., (1953) provides as follows:

> "*Any person* subject to the provisions of this chapter *who shall fail to obtain such good and sufficient bond,* or to exhibit the same, as herein required, *shall be personally liable to all persons who have furnished materials or performed labor* under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case, the prices agreed upon. Actions to recover on such liability shall

be commenced within one year from the last date the last materials were furnished or the labor performed . . ." (emphasis added)

As is admitted by the appellant, and is clear from the facts set forth, the appellant failed to require a bond with a good and sufficient surety to guarantee the prompt payment for the material furnished and the labor performed under the contract with Skyline Construction Company. At the time that the respondent submitted its bid to Skyline Construction Company on the appellant's project, said appellant required that such project be a bonded job. Thereafter, the appellant deleted the requirements for bonding on the part of Skyline Construction Company without notice to the respondent due to the savings in costs on the project of approximately $11,000.00.

This Court has had occasion to construe the meaning of the above quoted statutory language and has held that the owner of the property is liable to the subcontractors and employees of contractors for materials and labor supplied for improvement upon such land even where releases and lien waivers for the entire amount due and owing such person had been signed and delivered to the owner. In fact, however, such persons had not received the entire amount due and owing under the contract and employment agreements. This Court has consistently held that such releases and waivers were given without consideration and thus ineffective.

In the case of *Pierce v. Pepper*, 17 Utah 2d ~~120,~~ 123,

405 P.2d 345 (1965), plaintiff's employees were paid by their employer, Pepper, with worthless checks. They went to the defendant owner-builder who paid them for part of their work on condition that they sign releases and give lien waivers which would cover the entire amount of work which they had performed. The plaintiffs proceeded to complete the job, but were still unpaid for their prior labor because of the worthless checks. Recovery against the owner-builder was granted because of his failure to require the contractor to post the statutory contractor's bond as required under Section 14-2-1, U.C.A. (1953 as amended). The court held:

> "Failure to require the contractor to file the statutory bond is absolute and not subject to compromise here since the obligation was not dubious, contradictory or otherwise and *any attempt to circumvent the statutory interdiction was without consideration* . . . Having violated it . . . there was *no consideration for the waivers,* and the failure to require the contractor to file a bond to protect these workers under the plain wording of the statute, cannot ameliorate the obligations of the builder from its terms. . . ." (emphasis added)

This Court again had occasion to construe the meaning of this statute in the case of ***Roberts Investment Company v. Gibbons and Reed Concrete Products Company,*** 22 Utah 2d 105, 449 P.2d 116 (1969). In that case the owner of the property, while proceeding with the building project, employed various contractors to accomplish different phases of the construction. In

attempting to fulfill its contract with the owner, one of the contractors obtained concrete from Gibbons and Reed Concrete Products Company. Subsequently, the owner took over the construction project from that contractor and proceeded to complete the building. The owner thereafter acquired additional concrete from Gibbons and Reed Concrete Products Company. The owner subsequently paid Gibbons and Reed concrete Products Company for the amount of concrete which it had ordered after taking over the construction project from the contractor. Along with this payment, the owner demanded a receipt which recited that the sum mentioned was in full payment for labor and material furnished by Gibbons and Reed for the building in question, and further recited that disputes over amounts due for materials delivered to the owner were waived and settled and Gibbons and Reed released the owner from any and all claims it may have against the owner. The trial court concluded that the release and receipt was a release of all claims of Gibbons and Reed and entered judgment of no cause of action. The Supreme Court reversed and held that (1) the owner's payment of that amount to Gibbons and Reed was not sufficient consideration for the supplier's release of their claim against the contractor, and, (2) under Sections 14-2-1 and 14-2-2 U.C.A. (1953), the owner who had failed to obtain a performance bond from the contractor was liable for the amount owing the suppliers for concrete supplied by them to the Contractor. There was no dispute in the case that the owner had failed to comply with the requirements of

Section 14-2-1, U.C.A. (1953). However, the owner contended that having made the payment and having received the release of all claims from Gibbons and Reed, it was relieved from any liability arising under the statute. The Court, citing *Pierce v. Pepper*, supra, rejected defendant's argument and held that *there was no consideration for the release of the claim against the contractor* and by virtue of non-compliance with the statute, the owner was personally liable for such claims. The Court is confronted with the same type of situation here. The respondent did not receive the money due under the terms of the contract. The waivers given, in addition to being inconsistent, were not supported by any consideration whatsoever.

The appellant has gone to great lengths in its Brief attempting to review the law regarding mechanics' liens. The requirements with which the Court is here concerned are set forth in Sections 14-2-1 and 14-2-2 U.C.A. (1953 as amended). The appellant would have this Court ignore these statutes and merely review the mechanics' liens statutes of the state. We are not here concerned with the respondent's right to a mechanics' lien on the appellant's property, although even under such law, the respondent asserts that it would have had a valid claim.

It is to be noted that the statute in question does not make any qualification whatsoever as to the personal liability of one who fails to comply with the requirements of that statute. Quite the contrary, the statutory

duty to file the bond is mandatory and any attempt to circumvent the statutory interdiction is without consideration. *Pierce v. Pepper*, supra. The appellant has attempted to engraft upon the statute limitations of liability without any legal authority in support of its position. The appellant cites various mechanics' lien cases which are inapplicable when applied to the fact situation with which the Court is here confronted. The appellant cites *Zions First National Bank v. Reginald L. Saxton, et al.*, 27 Utah 2d 76, 493 P.2d 602 (1972) in support of its position. The factual situation in *Saxton* clearly demonstrates its inapplicability herein. In *Saxton*, the appellant had in fact been paid in excess of the amount of his claim. The fact that he signed a lien waiver at the time that he received payment demonstrates that full and adequate consideration was given is in exchange for receipt of the lien waiver. The actions of the appellant in *Saxton* subsequent to his receipt of the funds were irrelevant to the consideration before the Court. It should further be noted that the case made no reference whatsoever to Section 14-2-1 and 14-2-2 U.C.A. (1953), and dealt solely with the mechanics' lien statutes.

The same distinctions as above set forth hold true with regard to the case of *Holbrook v. Websters, Inc.*, 7 Utah 2d 148, 320 P.2d 661 (1958). The Court specifically found that the appellant had executed the receipt and lien waivers in exchange for good and valuable consideration. It is again important to note that *Holbrook* did not concern itself whatsoever with Section 14-2-1

and 14-2-2 U.C.A. (1953). *Holbrook*, as was the case in *Saxton*, concerned itself strictly with the operation of the mechanics' lien statutes.

The case of *West v. Pinkston*, 44 Utah 123, 138 P. 1152, in addition to being distinguishable on the same basis as the above cases, was decided in 1914. The specific language of the Utah Supreme Court in *West*, as quoted by the appellant in its Brief, clearly states that the decision of the Court was based upon the statutes concerning mechanics' liens as they existed at that time. However, the appellant fails to point out that the "statute" to which the Court referred was not the statute with which the Court is confronted in the case at bar, and indeed such burden would be impossible due to the fact that the statute now in question was not enacted by the Utah Legislature until 1915.

The appellant further cites the two cases of *King Brothers, Inc. v. Utah Dry Kiln Company*, 13 Utah 2d 339, 374 P.2d 254 (1962) and *Crane Company v. Utah Motor Park, Inc.*, 8 Utah 2d 413, 335 P.2d 837. In each of these cases, the Utah Supreme Court looked at cases decided under the mechanics' lien statutes in order to determine what was lienable. After considering whether a leasehold interest constituted an ownership interest which could be lienable in the former and whether a boiler was purchased for resale or whether a contract had been entered into for alteration and repair of the defendants property in the latter, the Court, specifically held in *Crane*, that,

> "The owner may escape personal liability by obtaining the bond as required by the statute."

There are no qualifications of liability imposed by these cases.

The appellant asserts in its Brief that liability under Sections 14-2-1 and 14-2-2 U.C.A. (1953) is not absolute. In support of this proposition the appellant cites the case of *Apex Lumber Company v. Comanche Construction Company*, 18 Utah 2d 119, 417 P.2d 131 (1966). In that case some Utah farmers employed Comanche Construction Company to install turkey enclosures upon their land. In the process, Comanche obtained materials from Apex Lumber Company. Upon completion of the job, Apex Lumber Company accepted promissory notes from the contractor as payment for the materials supplied. Comanche Construction subsequently resorted to bankruptcy, making the promissory notes worthless. Secondly, the evidence demonstrated that Apex allocated in a somewhat arbitrary manner the amounts due from each specific farmer. The *jury found* that Apex had been *paid by virtue of its acceptance of the promissory notes.*

The language quoted by the appellant in its Brief requires analysis. The Court stated that,

> "Apex urges that (1) the evidence shows Apex supplied material for which it was not wholly paid. Apex is right, but this is not controlling, since such an argument would insure it against

> any non-payment which it itself helped to produce, as was the case here. Further it says, (2) that under the statute it has a cause of action for the unpaid value of the material. Equally, this is true, unless it was particeps in creating a defense for its opponents, as was the case here.

Each of these positions is consistent with the holding in the case and the finding by the jury that Apex simply was estopped by virtue of the fact that it had been paid for the materials supplied in the construction of the turkey enclosures. Apex demanded and received the promissory notes in full payment for the balance due Comanche. Apex, of course, had the option to require cash payment and the fact that it accepted payment through another medium was its own choice. It was thereby estopped by virtue of payment in fact.

Assuming arguendo, that Apex does represent a qualification of the terms of liability imposed by Sections 14-2-1 and 14-2-2 U.C.A. (1953), one must note the policy upon which that qualification rests. In footnote Number 1 at page 131, the Court states:

> "This statute can stand a re-evaluation, since it puts the onus of obtaining the contractor's bond on the *unsuspecting and unknowledgeable householder* who seldom knows of its existence—in favor of the prime supplier, who generally knows all about it but relies on it in sober silence. (emphasis added)"

When one considers this statement by the Court in light of the facts presented in the case at bar, it is im-

mediately apparent that such policy is not involved in this case. J. C. Penney Co. is a highly sophisticated international corporation that has built hundreds of stores across the United States. The appellant is not in the position of the "unsuspecting and unknowledgeable householder" who seldom knows of the existence of the statute. In fact, the appellant knew of the existence of the statute and initially required that a bond be posted by the contractor as security for payment of the materialmen and suppliers on this job. However, upon learning that deletion of this requirement would save the appellant approximately $11,000.00 in the cost of the project, a change was instituted whereby this requirement was deleted. Thus, one need only turn to the second *Kings Brothers* case, 21 Utah 2d 43, 440 P.2d 17 (1968), wherein the Court specifically required that if the owner fails to comply with Section 14-2-1 and 14-2-2, U.C.A. (1953), "it places upon him the burden of seeing that the labor and materials are paid for." The facts in the case at bar demonstrate that the appellant did not carry its burden as required by the laws of the State of Utah and that there was no consideration given in exchange for the lien waivers supplied by the respondent. The respondent was not paid. (See *Pierce v. Pepper*, supra, and *Roberts Investment Company v. Gibbons and Reed Concrete Products*, supra.)

The appellant in its Brief asserts that the laws of the mechanics' lien statutes, as construed by the various cases handed down by the Utah Supreme Court, should govern the extent of applicability of Section 14-

2-1 and 14-2-2 U.C.A. (1953). The respondent cannot accept this assertion as being the law of the State of Utah. If the mechanics' lien statute is the law which governs the situation with which the Court is now confronted, then why did the Legislature see fit to enact Sections 14-2-1 and 14-2-2 U.C.A. (1953)? The Utah Supreme Court has spoken to this point in the past. In *King Brothers, Inc. v. Utah Dry Kiln Company*, 13 Utah 2d 339, 374 P.2d 254, (1962), the Court said that the mechanics' lien statute was designed to prevent the land holder from taking the benefit of improvements without paying for labor and materials incident thereto. However, the Court noted that the land owner frequently was the loser when the contractor failed to pay for the material and labor supplied. The Court noted that the passage of Sections 14-2-1 and 14-2-2 U.C.A. (1953) was a natural consequence of this inequity and protected the laborer, the materialmen, and the land owner.

The King Brothers case above cited is relied upon by the appellant. However, appellant failed to illuminate the sequel to the above case which was *King Brothers Inc. v. Utah Dry Kiln Company,* 21 Utah 2d 43, 440 P.2d 17 (1968) wherein the Court dealt with the question of whether the owner of a leasehold interest in land was "the owner of any interest in land" under Section 14-2-1 and 14-2-2, U.C.A. (1953). The Court utilized adjudications under the mechanics' liens statutes only for the determination of the definition of an "owner" so as to apply the above referenced statute. Again,

the Court was impelled to note that:

> "the statutes quoted above (Section 14-2-1 and 14-2-2, U.C.A. (1953) which required the owner to obtain a bond from a contractor, are a natural development upon the mechanics' lien statutes, which compel the owner of realty, who contracts for its improvement, to see that those who furnish the labor and materials are paid. The requirement of the performance bond provides a means by which the owner can protect himself as well as the labor and materialmen. *But if he fails to comply with the statute, it places upon him the burden of seeing that the labor and materials are paid for . . .*" (emphasis added).

It is therefore clear that the statute in question is not limited and totally governed by the mechanics' lien statute and the ajudications thereunder. This Court has acknowledged the specific requirements of Sections 14-2-1 and 14-2-2 U.C.A. (1953) in placing an extra burden upon a land owner so as to insure the payment of all materialmen and suppliers for the improvement made upon the owner's property. Thus, by failing to observe the requirements of the laws of this State, the appellant had the burden of seeing that the respondent was in fact paid.

POINT II

THE COURT BELOW WAS CORRECT IN HOLDING THAT THE APPELLANT COULD NOT JUSTIFIABLY RELY ON THE LIEN WAIVERS IN QUESTION.

The District Court held that the appellant could not justifiably rely on the lien waivers in question. Contrary to the position taken in the appellant's Brief, the Court below referred to such unjustified reliance in holding that "said reliance is not a defense to the claim of the plaintiff." (R. 28). The fallacy of the appellant's argument of justifiable reliance is demonstrated simply by reference to the facts of this case, and specifically with reference to the admissions of the appellant's agent, the supervising architect.

In the process of the construction of the appellant's store in Bountiful, Skyline Construction Company periodically submitted requests for progress payments. These requests were submitted on a monthly basis and were accompanied by various lien waivers signed by the subcontractor and materialmen working on the project (Page 7 through 8, Peterson's deposition.) These items were submitted to Charles Peterson, the supervising architect employed by the appellant, who would, upon receipt, inspect the job site to determine whether the amount submitted on the draw request and supported by lien waivers was correct in terms of progress on the project. According to Mr. Peterson,

> "We would take these lien waivers and review them and see that the amount shown on the lien waivers were consistent with the amount of money that had been paid on the previous estimate." (Peterson's deposition pages 7 and 8 lines 25 through 2).

On various occasions, Mr. Peterson would require changes to be made before he would authorize payment. He would therefore, request lien waivers reflecting a different amount than the one submitted. Mr. Peterson accepted changed lien waivers which would sometimes reflect only the difference between what was furnished by the first one and the amount of change that he had requested, and at the same time accepted a subsequent lien waiver covering the full amount. (Peterson deposition, page 10 through 11, lines 13 through 17). With this system of accounting, inconsistency had to result. In fact, Mr. Peterson knew that there were inconsistencies with regard to the lien waivers on behalf of the respondent. He brought these inconsistencies to the attention of the appellant. The appellant took no action. More importantly, however, Mr. Peterson states that,

> "I suspected the maximum lien waiver that I had, whether it was the previous month or the succeeding month, was equal to or exceeded perhaps the amount of work that was accomplished. I frankly did not worry too much if the lien waiver exceeded the amount of money that was shown on Skyline's monthly breakdown."

Mr. Peterson was basically satisfied because he thought that the owner was being protected. (Peterson deposition page 14 lines 4 through 24.) Mr. Peterson further acknowledges that he did not expect to get exact figures with regard to lien waivers and basically was concerned only with some supportive evidence that the subcontractors were getting paid as the job progressed. (Peter-

son deposition page 23 lines 7 through 11). Further, when asked if, in his position, it was his primary concern to see that lien wavers were executed for a sum equal to or more than the amount needed, he responded.

> "equal to or more, because I *assumed* that if it is more than shown on the trade categories, *maybe* the general contractor, you know, paid a guy for work a little early." (Peterson deposition page 23 lines 17 through 19). (emphasis added).

Clearly, Peterson, as the agent for the appellant, was not complying with the requirements laid down by the second *Kings Brothers* case, 440 P.2d 17, wherein the Court states:

> "but if he fails to comply with the statute, it places upon him the *burden* of seeing that the labor and materials are paid for."

Peterson further admits that he was not relying upon the lien waivers to show that actual payment had been made but only that the subcontractors had waived their lien. (Peterson deposition page 25 lines 19 through 22). Peterson also did not take it upon himself to advise the subcontractors that various reductions were being made in the lien waivers after they were submitted and had no knowledge as to whether Skyline Construction had assumed such responsibility. (Peterson deposition page 29 lines 13-17.) Finally, Mr. Peterson admits, that on or about July 14, due to the discrepencies contained in some of the lien waivers, it suggested to him that possibly Skyline was not paying to some of the sub-

contractors as much as was being represented. (Peterson deposition page 31 lines 7 through 15). Regardless of this suspicion and, indeed, regardless of the requirements of Sections 14-2-1 and 14-2-2 U.C.A. (1953 as amended), Peterson, as the agent for the appellant, failed to satisfy the appellant's burden of seeing that the subcontractors were paid. He assumed that maybe they were being paid.

With the procedure utilized by Mr. Peterson on behalf of the appellant in handling the project, and in referring to the lien waivers themselves, it is clear that there is no basis for appellant's claim of justifiable reliance even if one were to ignore the fact that many of the lien waivers were not dated when signed by Mr. Niederhauser. One can see the obvious discrepency between the respondent's lien waivers dated May 31, 1971, and June 30, 1971. Two out of the three blanks indicating payment were not filled in on the latter and there is *no acknowledgment on the part of Mr. Niederhauser of payment* on that day in any amount. The previous acknowledgment of payment on May 31, 1971, acknowledged the receipt of an exact figure on that date. The discrepancies however, do not end on June 31, 1971. The lien waivers dated August 8, 1971, August 27, 1971, and the lien waiver received by Mr. Peterson on October 13, 1971, but which was undated as to the signature, and the lien waiver dated October 31, 1971, contain discrepancies in the figures represented thereon which are impossible of explanation. When reviewing all of the waivers, it is clear that inconsistency

permeated the entire system of lien waivers utilized by the appellant. The respondent respectfully submits that there was no basis on the part of the appellant for any reliance when the lien waivers themselves, on their face, were inconsistent with each other. Peterson, however, when he received the final lien waiver dated October 31, 1971, upon which appellant asserts reliance, did not even bother to compare it with the previous waivers. (Peterson's deposition p. 44, lines 4-10). The defendant had no factual basis upon which to assert its so-called "justifiable reliance" and the respondent submits that such assertion is without any merit whatsoever. Where there were uncertainties in the instruments, such as is clearly apparent here, it was incumbent upon the appellant to resolve these uncertainties before acting in reliance on these uncertain representations. (See the second *King Brothers, Inc. v. Utah Dry Kiln Co.*, supra.) The appellant's assertion now that respondent is estopped by virtue of these uncertain documents and representations, is without merit and is not a basis upon which the appellant could assert justifiable reliance. (*See Petty v. Gindy Manufacturing Corporation*, 404 P.2d 30, 17 Utah 2d 32 (1965)).

The appellant further asserts that its defense of reliance is available to a surety if a bond had been required. No Utah law is cited in support of this proposition. But, assuming that a defense of justifiable reliance would be available to a surety, one need only return to the facts as above set forth to determine that there is no basis for such a defense here. The appellant was ad-

vised of the discrepancies in the lien waivers and chose to ignore it. But the appellant asserts that it took all possible precautions to assure itself that all subcontractors were being paid by the general contractor through progress payments during the course of the construction project. Clearly, the appellant's position is untenable and totally unsupported.

POINT III

THE ORDER CONDITIONALLY STAYING ENFORCEMENT OF THE JUDGMENT IS VALID.

The Order Conditionally Staying Enforcement of Judgment herein was just that: the execution upon the Judgment was stayed upon the Stipulation of appellant to satisfy a condition. That condition is clearly spelled out in the Order (R. 11).

Under Rule 62 of the Utah Rules of Civil Procedure, the District Court has discretion whether to stay execution upon a Judgment under certain circumstances. Clearly, the respondent was entitled to execute immediately upon entry of the Judgment. Rule 62(a), Utah Rules of Civil Procedure.

The appellant moved the Court for an Order Staying Enforcement of the Judgment against it, counsel was heard on the motion and the Court entered its Order whereby the appellant was given a choice in the matter

and elected to perform pursuant to the condition contained in said Order. The appellant cannot now be heard to complain regarding the exercise of its choice in the matter. Appellant clearly had the alternative to pay the Judgment assessed and pursue its appeal, or retain the money represented by the Judgment and agree to pay the interest rate ordered by the Court below. It chose the latter. The Order is clear regarding this matter.

CONCLUSION

It is clear from the facts of this case that the appellant has attempted to circumvent the statutory interdiction of Section 14-2-1 and 14-2-2 U.C.A. (1953 as amended). This Court has consistently held that such attempts are unjustified and the failure of the owner to require the bond under the plain wording of the statute cannot ameliorate the obligations of the owner from its terms. As this Court said in *Pierce v. Pepper*, supra,

> "This Court did not pass the statute, but we think it clear enough to impose liability if the builder (owner) forgets it or tries to save a bond premium by violating it."

The law of this state imposes a burden upon the owner to see that the subcontractors and materialmen are paid. When the owner disregards the requirement of Sections 14-2-1 and 14-2-2 U.C.A. (1953, as amended) that burden is absolute. It requires that the owner

determine for himself that these people who have contributed their efforts and materials for the benefit of the owner are in fact paid for same. Here, the appellant, by the admissions of its agent and supervising architect, did not satisfy this duty.

The Judgment below in favor of the repondent and against the appellant should be affirmed.

Respectfully submitted,

RICHARD H. MOFFAT

JOHN L. YOUNG

Attorneys for Plaintiff-Respondent

9th Floor Tribune Building
Salt Lake City, Utah 84111