

1978

Koppers Company, Inc v. Acord-Harris Construction Company, A Corporation and Fireman's Fund, A Corporation : Appellants' Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KOPPERS COMPANY, INC., :
Plaintiff-Respondent, :
vs. : Civil No. 15612
ACORD-HARRIS CONSTRUCTION :
COMPANY, a corporation and :
FIREMAN'S FUND, a corporation. :
Defendants-Appellants. :

APPELLANTS' BRIEF

Appeal from the Judgment of the 2nd
District Court for Weber County
Hon. J. Duffy Palmer, Judge

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Clerk, Supreme Court, Utah

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ACORD-HARRIS CONSTRUCTION :
COMPANY, a corporation and :
FIREMAN'S FUND, a corporation. :
Defendants-Appellants. :

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by the Plaintiff subcontractor for monies due under a subcontract, with a counterclaim by the defendant general contractor for damages for breach of the subcontract.

DISPOSITION IN LOWER COURT

Upon motion of the plaintiff the court granted a Partial Summary Judgment from which the defendants appeal.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the Partial Summary Judgment.

STATEMENT OF FACTS

Since this is an appeal from an Order granting a Partial Summary Judgment in favor of the Plaintiff, the facts should be considered most favorably to the Defendants in this case.

Defendant Acord-Harris Construction Company had a contract with the Utah State Building Board for the construction of the Dee Special Events Center on the campus of Weber State College in Ogden, Utah. (R. 1) Plaintiff Koppers Company, Inc. was the subcontractor under a written subcontract agreement with the Defendant whereby Koppers agreed to furnish and install a wood dome for the Dee Special Events Center at a contract price of \$766,168. The subcontract is attached to the Complaint. (R. 1, 4)

Plaintiff Koppers claims in the Complaint filed in April 1977, that it has completed its subcontract obligations, that the Defendant Acord-Harris has failed to pay the sum of \$150,678 and that the Defendant Acord-Harris is in breach of the subcontract. (R. 2)

The Defendants Acord-Harris and Fireman's Fund Insurance Company, the surety on the project for Acord-Harris, deny that the Plaintiff has completed the subcontract, deny that the Plaintiff has owing to it the sum of \$150,678, and deny that Acord-Harris has breached the subcontract. The Defendants allege affirmatively in their Answer and also by Counterclaim, that (a) the Plaintiff breached the subcontract.

in not bringing to the attention of the contractor and the architect engineer the fact that the Plaintiff's design of the roof Dome and the owners design of the supporting truss were not compatible, thus requiring a redesign of a more costly truss; which in turn damaged the Defendant in the amount of \$76,646; and (b) that the Plaintiff further breached the subcontract in providing erroneous engineering information which resulted in an additional \$20,000 in damages to the Acord-Harris Construction Company. (R. 15, 16, 18-20) In said Counterclaim the Defendant also seeks attorney's fees and "such other relief" as the court deems just. (R. 24, 25)

In July 1977 Defendant Acord-Harris in Answers to Interrogatories, reduced the \$20,000 damage claim to a figure of \$12,320. (R. 38)

In August 1977 the Defendants filed their Request for Production Documents for Inspection and Copying, requesting information concerning the material and labor costs associated with the first truss design and second truss design and also concerning other relevant matters. (R. 89-93) The Plaintiff's production was incomplete (R. 101-105), and the Defendant filed a Motion to Compel Discovery, seeking appropriate answers to said requests. (R. 106-109)

Thereafter on November 8, 1977 the Plaintiff filed a Motion for Partial Summary Judgment claiming that Judgment should be entered in the amount of \$54,032. (R. 113)

On November 11, 1977 the Court entered an Order requiring the Plaintiff to appear November 28, to there furnish the required documents (R. 114) and to at that hearing open files and submit to an exchange of documents. The Plaintiff also submitted a request for production of documents. (R. 116-118)

Thereafter on November 23, 1977 the Defendants filed the only affidavit in this matter. (R. 119-112) In this affidavit the Defendant's general manager M. L. Harris, stated that the figures previously given in the pleadings were not complete in that they did not include the complete supervision and management costs, consequential costs, engineering cost to be paid to Reaveley Engineers, and possible delay damages covering a period for anywhere from 15 to 30 days at \$500 a day. These costs would increase the amount in issue in the action. (R. 119, 121) The affidavit further stated that the pleaded costs did not reflect all of the costs, and that additional discovery is necessary to determine the total costs incurred by the defendant. (R. 121)

The affidavit further states that the written approval of the structural adequacy of the Dome had not been given by the owner, that the contract between Acord-Harris and the owner, and the contract between the Defendant Acord-Harris and the Plaintiff Koppers have not been fully performed; and that further measures may yet be re-

quired to insure the structural adequacy of the Dome at a cost to Defendant Acord-Harris, not yet possible to determine. (R. 121, 122)

On December 5, 1977 the trial court granted the Plaintiff's motion for a Partial Summary Judgment, in the amount of \$60,862 (R. 128) stating that,

"Nothing in this Judgment shall affect Plaintiff's right to claim the remaining amount alleged by Plaintiff to be due and owing on said contract, to which Defendants claim an offset...that Plaintiffs claim for interest on said amount is reserved until time of trial."

The Court further stated,

"...That the Defendants' Motion to Compel Discovery is granted and that both...(parties)...are ordered to exchange documents on December 15, 1977 at the office of Plaintiff's counsel."

This Order was signed December 5, 1977 and filed December 7, 1977 by District Judge J. Duffy Palmer. (R. 128,129)

The transcript of the Record for the hearing on the Motion for Partial Summary Judgment includes no evidence but merely reports the statements by both counsel in support of their positions. (R. 156-165) Defendant's counsel argued that there are additional bills and additional costs which have not yet been developed through discovery. Plaintiff's counsel argued that there is no issue about the \$60,862. The trial judge briefly commented on his reason for granting the Judgment (R. 161, 166, 167), stating,

"That Court has read the filings and the pleadings, the responses to discovery in the file. It seems very speculative that these things might come up even in counsels arguments that these things aren't speculative because they might come up.

It's the Judgment of the Court that Judgment will be rendered for the \$60,862. The rest of it, remaining to be argued and discussed at the time of the trial or between the parties after the discovery is completed and each of you have had an opportunity to answer your interrogatories." (R. 167)

Concerning the production of documents, the Court then stated:

"Of course, the Judgment again, the Motion to Compel is granted and they should be complete by December 15th." (R. 167)

ARGUMENT

POINT I. SUBSTANTIAL AND MATERIAL FACT ISSUES PRECLUDE THE PARTIAL SUMMARY JUDGMENT.

The basic concept in the review of the Summary Judgment proceedings has been repeatedly stated by this Court in a number of cases, one of which is fairly representative:

"A Summary Judgment must be supported by evidence, admission and inferences which when viewed in the light most favorable shows that, 'There is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor."
Bulloch vs. Deseret Dodge Truck Center, Inc.,
11 Utah 2d 1, 354 P.2d 559.

See also Rule 56(c) U.R.C.P. which gives us the basic law.

uage:

"The Judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..."

The issue to be decided is whether or not there are any substantial issues of fact which should be tried. In Tanner vs. Utah Poultry and Farmers Cooperative, 11 Utah 2d 353, 359 P.2d 18 this Court stated:

"Summary Judgment is appropriate only where the favored party makes a showing which precludes, as a matter of law, the awarding of any relief to the losing party." See also Morris vs. Farnsworth Motel, 123 Utah 289, 259 P.2d 297.

Thus in the subject case Appellants believe that the trial judge could not say as a matter of law that defendants would not be entitled to any further damages at trial.

A. The Pleadings, Answers to Interrogatories and the Defendants' Affidavit Present Fact Issues.

A brief summary of the relevant portions of the Complaint, Counterclaim, Answers to Interrogatories and Affidavit indicates quite clearly that there are fact questions which defendants are entitled to present to the trial court:

The Complaint alleges that the Subcontract has been completed, that the full contract price of \$776,000 is owing, that the Defendant Acord-Harris has breached

that contract and that the Plaintiff is entitled to the unpaid balance of \$150,678. (R. 15, 16)

On the contrary Defendants in their Answer and Counterclaim deny that the Subcontract has been completed, deny that the full contract price is owing, deny that Acord-Harris has breached the Contract, and that the Plaintiff is entitled to the unpaid balance.

Therefore in the pleadings alone we have fact issues concerning completion of the Contract, breach of the Contract and the amount of dollars which would be owing under the Contract.

In the Counterclaim the defendants claim offsets for two specific breaches allegedly committed by the Plaintiff involving \$76,646 and \$20,000 in damages. (R. 15, 16, 18-20) By Answers to Interrogatories defendants further reduce the \$20,000 figure to \$12,230. (R. 38)

Rule 56(c) U.R.C.P. provides,

"The adverse party prior to the day of hearing may serve opposing Affidavits."

On November 23, 1977, five days prior to the hearing on the Motion for Summary Judgment, defendant served such an affidavit. The Affidavit states that there will be additional offsetting damages and that the previous damage figures given were not complete. (R. 121) Among those additional items which would increase the offset were additional supervision costs, additional management cost

consequential costs, engineering costs and possible delay damages assessed at \$500 a day for a period of from 15 to 30 days which would be charged against the Plaintiff.

Thus considering the Complaint, Answer and Counterclaim, Answers to Interrogatories along with the Affidavit the evidence shows that there are not only offsets of \$76,646 & \$12,230, but also additional costs which have yet to be determined, and which if and when they are determined will further reduce any amount which may ultimately be payable to the Plaintiff. It is clear therefore that if the Defendants are given a trial there is a reasonable probability, according to the Affidavit, that additional damages would be awarded to the Defendants. As the Court stated in Holbrook Company vs. Adams, 542 P.2d 191 (Utah 1975),

"...it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact. This is analogous to the elemental rule that the fact trier may believe one witness as against many or many against one....";

and in Disabled American Veterans vs. Hendrixson, 9 Utah 2d 152, 340 P.2d 416

"...if then any material facts asserted by the plaintiff are contradicted by the defendant, the facts as stated by the defendant must, on such motion be taken as true."

The Defendant's claim had to be asserted as a compulsory Counterclaim because it claimed damages arising out of the same subcontract performance which was the

basis for the Plaintiff's claim. It should also be noted that at the filing of the Complaint in April 1977 and even continuing up to the Affidavit in November 1977, neither the Subcontract work nor the prime Contract between the State of Utah and the Defendant had been completed. Thus the claims and counterclaims between the Plaintiff and Acord-Harris had not yet been formulated to a point where the full extent of the Defendant's damages could be determined. Of course every dollar of damages suffered by the Defendants because of the breaches by the Plaintiff goes to reduce the amount, if any, ultimately found to be due by the defendants to the plaintiff after trial.

In Burningham vs. Ott, 525 P.2d 620 (Utah 1974) this Court states:

"In Summary Judgment evidence is not to be viewed. The Judgment can be given only in case there is no dispute on a material evidentiary matter."

The Court goes on to say in quoting the language of Justice Wade in a prior case:

"Such showing must preclude all reasonable possibility that the loser could, if given a trial produce evidence which would reasonably sustain a Judgment in his favor.

"Who knows what evidence a party might produce if given the opportunity? In the light of the modern practice under the Rules of Civil Procedure, a trial is not to be by ambush. Instead the evidence upon which one relies for judgment can be and should be known to the opponent; and when all the evidence is known, if there is no dispute on any material issue of fact the Rules provide that

the Court may apply the law and thus terminate the matter, thereby conserving the time of the court and avoiding expense to the state and to the litigants."

To grant the Partial Summary Judgment in this case, the Trial Court must disregard the defendant's Affidavit; otherwise the Affidavit clearly sets forth the fact that there will be additional costs arising out of the deficiency in the trusses and Dome construction. In a Summary Judgment proceeding the Trial Court is precluded from weighing the evidence and a Summary Judgment can only be granted where..."the favored party makes a showing which precludes, as a matter of law, the awarding of any relief to the losing party." Tanner vs. Utah Poultry and Farmer's Cooperative, supra. In this case the Court had to weigh the effect of the Affidavit and the testimony included therein. The Court stated (R. 162) after Mr. Osburn, counsel for Defendants, had explained the significance of the Affidavit and the additional costs anticipated

"The Court has read the filings and the pleadings, and the responses to discovery in the file. It seems very speculative that these things might come up even in counsel's argument that these things aren't speculative because they might come up."

It is apparent that the Trial Court is weighing the evidence submitted in the Affidavit and pronouncing judgment on the relevancy and competency of the testimony therein. As the Court said in Holbrook Company vs. Adams, supra

"It is not the purpose of the Summary Judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail."

The Affidavit states in part, (R. 120)

"5. That the aforesaid costs comprise only estimates of labor, material and overhead costs, and do not include complete supervisory and management costs, nor consequential costs incurred by defendant because of the matters at issue in this action.

6. That the determination and discovery of the full costs in issue is continuing on the parts of both plaintiff and defendant.

7. That plaintiff has served defendant with a request for production of documents related to said costs.

8. That defendant has served plaintiff a request for production of documents in part relating to said costs, and that defendant's motion to compel plaintiff to produce said cost documents is before this court.

11. That defendant has not yet received complete bills for labor and materials from suppliers associated with the trusses and light ring, or, if complete bills have been received then the portions of sums billed attributable to matters at issue in this action are not apparent, so that considerable additional analysis is required to determine the total sum at issue in this action. That the foregoing statement applies to at least Neiderhouse Ornamental Iron Company, Anderson Lumber Company, Heat Rite Engineering Company and Gresham Roof. That until said billings are complete and/or said analyses are completed, the sum alleged in plaintiff's motion as not in issue is in fact in issue."

Finally in paragraph 13 Affiant states in substance that the structural adequacy of the Dome remains in question, that further steps may need to be taken to assure adequacy of same at a cost to defendant and "that since said costs may yet be incurred by defendant as a result of actions of plaintiff as alleged in the pleadings, and because plaintiff's contract with defendant has not been performed the sum alleged as not in issue in plaintiff's motion is in fact an issue..." (R. 122, 122)

B. Incomplete Pretrial Discovery has Given Rise to the Substantial Fact Disputes. The extent of the Defendant's damages when the Motion for Summary Judgment was filed in November 1977 was still developing, because the defendant's actual costs were still accruing, the Subcontractor's work had not been accepted and completed, and the extent of the liquidation damages resulting from the Subcontractor's actions had not yet been asserted by the owner. These matters are all clearly set forth in the Defendant's Affidavit. (R. 119-122) Fortunately for the Plaintiff, and unfortunately for the Defendant, at the time of the Motion for Summary Judgment only the specific two damage figures had been compiled and determined. Even then it was clear that there was a difference between the \$20,000 alleged in the Counterclaim and the reduction two months later to the actual figure of \$12,230. To permit Summary Judgment at the particular instance in time when

these two figures had become certain, but to ignore additional accruing costs is contrary to the spirit and intent of the Summary Judgment proceedings. This court in Dupler vs. Yates, 10 Utah 2d 251, 270, 251 P.2d 624, said

"Upon a Motion for Summary Judgment, the Courts ought to recognize as a minimum, that the opposing party produces some evidentiary matter in contradiction of the movant's case or specify in an Affidavit the reason why he can not do so.

"Where, as in the instant case the materials presented by the moving party are sufficient to entitle him to a direct verdict and the opposing party fails either to offer counter affidavits or other materials that raise a credible issue or to show that he has evidence not then available, Summary Judgment may be rendered for the moving party." (underlying added)

Thus this Court recognizes that under some circumstances the opposing party may not be able to produce the actual evidence required at the time but that said evidence can probably be furnished in the future. Such as our own case. To grant a judgment on damages simply because at one particular point in the pretrial procedure, a definite figure has been determined and at the same time disregard the fact that additional amounts are yet to be determined, certainly is contrary to the above concept enunciated by this Court. See also Lee vs. Mobil Oil Corporation, 452 P.2d 857 (Kan. 1969) where the Kansas courts upheld the general rule that Summary Judgment should not be entered where the opposing party is proceeding with due diligence with pretrial discovery.

Rule 56(c) U.R.C.P. seems to support this concept in the case of damages. The Rule permits a Partial Summary Judgment on the issue of liability when there is a genuine issue as to the amount of damages,

"A Summary Judgment Interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

The Rule does not say that an Interlocutory Judgment on damages can be granted without determining the question of liability. The reason is obvious, since in almost any claim for damages the full extent of the damages may not develop until discovery is complete or even until pretrial. There has been no representation on the part of the defendants that the damages are fixed and that there will be no modifications at all between pretrial discovery and actual trial. The Affidavit is quite to the contrary.

Were we to allow a Summary Judgment on damages at this point it would simply preclude the defendants from claiming any further damages as an offset to the amounts which may be payable to the Plaintiff. It would preclude the possibility of amending the Pleadings under Rule 15 U.R.C.P. to increase damages and thus decrease the final amount found to be due the plaintiff.

The determination of the quantity and reasonableness of damages is one of fact to be submitted to the Trial Court. Hatch vs. Sugarhouse Finance Company, 20 Utah 2d 146, 434 P.2d 758.

The result of allowing a Partial Summary Judgment on damages, which eliminates certain claims for damages but preserves the remaining question for trial is more in the nature of a pretrial order, since the courts are reluctant to grant piecemeal appeals. The Federal Courts are quite clear on this point. See Leonard vs. Socony-Vacumn Oil Company, 130 F.2d 535, (CAA 7th, 1942) where the Court held that a Partial Summary Judgment which eliminated certain claims for damages but left the remaining ones for determination is nothing more than a interlocutory order.

"This problem of Partial Summary Judgment is very similar to that arising upon orders allowing Motions to Strike, used to eliminate certain matters before trial by having them determined preliminary to trial. The Federal Courts have uniformly held that Orders upon such motions are not, in themselves, such final orders as to be appealable."

Rule 54(b) U.R.C.P. provides in substance, that unless certain specific requirements are met, an order such as has been given here is subject to revision at any time before the entry of final judgment. Unless the judgment makes an express determination that there is no just reason for delay and makes an express direction for the entry of judgment, that

"...any order or other form of decision however, designated, which adjudicates fewer than all the claims of the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the

order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Thus in this case where liability has not been established on the part of the plaintiff, and even though the court has fixed a definite offset allowable to the defendant, such a decision can not be final, because the judgment does not dispose of one of the claims, or one of the parties, and is not stated in the specific language required under the rule.

C. The Defendants Have Claimed Their Additional Damages in a Timely Manner. A brief listing of the steps leading up to the Motion for Summary Judgment and the Order issuing therefrom shows that there has been no delay by the defendants in setting forth facts to support additional costs. The sequence of events is as follows:

(a) Complaint filed March 29, 1977

(b) Answer and Counterclaim of Acord-Harris filed April 18, 1977 (R. 12)

(c) Reply to Counterclaim filed May 20, 1977 (R. 27)

(d) Plaintiff's Interrogatories to the Defendant filed June 20, 1977 (R. 33)

(e) Defendant's Answer to Plaintiff's Interrogatories filed July 19, 1977 (R. 33)

(f) Defendant's Request for the Production of

Documents filed August 1, 1977 (R. 89)

(h) Plaintiff's Answer to Request for Production of Documents filed October 17, 1977 (R. 101)

(i) Defendant's Motion to Compel Discovery filed October 26, 1977 (R. 106)

(j) Notice of Hearing on Motion to Compel Discovery filed October 26, 1977 (R. 110)

(k) Minute Entry ordering both sides to file documents in dispute entered November 7, 1977 (R. 112)

(l) Motion for Partial Summary Judgment filed November 9, 1977 (R. 113)

(m) Plaintiff's Request for the Production of Documents filed November 16, 1977 (R. 116)

(n) Defendant's Affidavit in Opposition to Motion for Summary Judgment filed November 23, 1977 (R. 119)

(o) Hearing on Motion and Entry of Order granting Summary Judgment entered November 28, 1977 (R. 127)

Thus there can be no claim that the pretrial discovery has in any way been delayed by the Defendant's nor can there be any claim that the Defendant's have refused to respond to any pretrial discovery request. To the contrary the discovery has proceeded expeditiously and the Defendants, within the time provided in Rule 56, have filed their Affidavit in Opposition to the Motion.

There is therefore no just reason to prejudice the Defendants in the presentation of their case by dis-

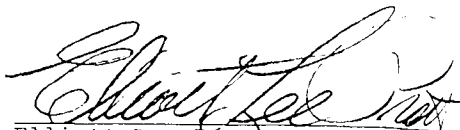
regarding the Affidavit upon the grounds either that it was too late or that the trial court did not deem there was enough relevancy to the claims set forth therein. Both determinations are contrary to the purposes of the Summary Judgment Rule.

SUMMARY

Appellants submit that Rule 56 U.R.C.P. does not permit a Partial Summary Judgment on one element of damages where pretrial discovery relating to the balance of the damages has not been completed. In our case the Motion to Compel Discovery and requiring the plaintiff to produce various documents and figures relating to costs and damages was still pending before the court at the time the Summary Judgment was ordered. The parties were not required to produce these documents until some two weeks after Summary Judgment was ordered. The Partial Summary Judgment should not be allowed where there are still issues of liability concerning breach of contract, and concerning the amount owing on the Contract. Nor should it be allowed where the damages are still unsettled because the prime contract and subcontract performances have not yet been completed, and accepted. We think the judgment of the court was premature and will work a distinct hardship on the defendants by precluding them from further development of their costs and damages, and precluding any amendment to their claims as discovery develops.

Defendants respectfully submit that the Partial
Summary Judgment should be reversed.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Elliott Lee Pratt". The signature is written in dark ink and is positioned above the printed name.

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