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Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

KOPPERS COMPANY, INC., :

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

RESPONDENTS' BRIEF

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

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FILED

MAY - 1 1978

Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT	
I. NO MATERIAL ISSUES OF FACT EXIST AND THUS THE PARTIAL SUMMARY JUDGMENT AS TO DAMAGES WAS PROPER	4
A. The Pleadings, Answers to Interrogatories and the Affidavit Do Not Present Any Material Issues of Fact	5
B. The Affidavit Contains Only the Mere Assertions of Affiant that Material Issues Exist Which is Insufficient to Put the Issues Into Controversy	8
C. Partial Summary Judgment as to Damages is Proper in this Instance	13
SUMMARY	14

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AUTHORITIES CITED

CASES

Page

Bulloch v. Deseret Dodge Truck Center, Inc., 11 U.2d 1, 354 P.2d 559, 561 (1960) 5

Burningham v. Ott, 525 P.2d 620 (Utah 1974) 7

Carlson v. Milbrad, 415 P.2d 1020 (Wash. 1966) 13

Dupler v. Yates, 10 Ut.2d 251, 351 P.2d 624, 636 (Utah 1960) 12

Foster v. Steed, 19 U.2d 135, 432 P.2d 60 (1967) . . . 9

Holbrook Company v. Adams, 542 P.2d 191 (Utah 1974) 12

Kuhn Construction Company v. State, 248 A.2d 612 (Del. 1968) 14

Leninger v. Stearns-Roger Manufacturing Co., 17 U.2d 314, 404 P.2d 33 (1974) 8

Menlove v. Salt Lake City, 18 U.2d 203, 418 P.2d 227 (1966) 9

Smithers v. Ederer, 303 P.2d 771 (Cal. 1956) 14

Walker v. Rocky Mountain Recreation Corporation, 29 U.2d 274, 508 P.2d 538 (1974) 9

RULES OF CIVIL PROCEDURE

Rule 56(c) Utah Rules of Civil Procedure 4

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IN THE SUPREME COURT

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

RESPONDENTS' BRIEF

STATEMENT OF THE CASE

This is an action by the Plaintiff subcontractor for monies due and owing under a completed subcontract, in which Defendant general contractor claimed specified offsets due to an alleged 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

Plaintiff seeks affirmance of the Partial Summary Judgment.

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STATEMENT OF FACTS

Defendant Acord-Harris Construction Company was the general contractor for the construction of the Dee Special Events Center on the campus of Weber State College in Ogden, Utah. On March 24, 1975 pursuant to that prime contract, Defendant and Plaintiff Koppers Company, Inc. entered into a written subcontract whereby Plaintiff would furnish a wood dome for the Center. The contract price agreed on between the parties for the labor and materials was $766,168.

Plaintiff Koppers completed its performance under the subcontract in 1976 and sought the balance due and owing under the contract price. Upon Defendant's failure to make proper payment, Plaintiff instituted this suit on March 29, 1977 against Defendant Acord and its surety, Fireman's Fund, for breach of the subcontract (hereinafter referred to as singular "defendant"). In its complaint, Plaintiff acknowledged receipt of $615,490 in progress payments, and sought the balance of the subcontract price in the sum of $150,678. (R. 1-9)

The Defendant by answer and counterclaim admitted the subcontract with the price of $766,148 and payments made of $615,490, and generally denied a breach of the subcontract and the balance due of $150,678. (R 12-26, 54-88) The Defendant as its only defense, which it also proffered as a counterclaim, alleged a breach of the subcontract on the

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part of Plaintiff resulting in damage to Defendant. However, the Defendant only claimed damage to the extent of $76,646 for redesign of certain trusses and $20,000 for mistake made on a light support ring, for a total claimed offset of $96,646. (R 12-26, 38, 54-88)

Using the discovery process, Plaintiff tried to ascertain the possible extent of Defendant's claimed damages. In July 1977 Defendant in answers to interrogatories, reduced the claimed damage for the light ring problem from $20,000 to $12,320. (R 38)

The pleadings thus indicated that Plaintiff was claiming payments due of $150,678, with Defendant's only defense being an offset of $88,966 for the alleged breaches of the subcontract. Thus, there was a difference of $61,712 between the claim of $150,678 and the alleged offset of $88,966. Plaintiff on November 8, 1977, filed a Motion for Partial Summary Judgment for the amount of the undisputed difference.

On November 23, 1977, the Defendant filed the affidavit of M. L. Harris in opposition to the Motion for Partial Summary Judgment. (R 119-122) The affidavit purports to put material issues of fact into controversy by stating that all of Defendant's previous damage claims have been mere estimates and that other additional costs such as supervisory and consequential costs, are chargeable to

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Plaintiff. It should be remembered that this affidavit was filed over one year after Plaintiff had completed its subcontract. However, even at this late date in the proceedings, the Defendant was unable to set out what in fact the costs would be. Rather, the affiant stated that "it is his information and belief that said costs are in excess" of those previously claimed. (R 120) The only additional cost that could be put into issue was a charge of $850 claimed due because of the redesign of the trusses. (R 120)

On December 5, 1977 District Judge J. Duffy Palmer held a hearing on the Motion for Partial Summary Judgment. Based on the pleadings as presented and after statements of counsel, Judge Palmer granted the Partial Summary Judgment in the amount of $60,862. (R 166-167) After hearing argument, the trial judge held that it was "very speculative that these things [costs] might come up", and therefore no genuine issue existed. The judge left the balance of the claim of Plaintiff and the corresponding alleged offset to be heard at trial.

ARGUMENT

POINT I. NO MATERIAL ISSUES OF FACT EXIST AND THUS THE PARTIAL SUMMARY JUDGMENT AS TO DAMAGES WAS PROPER.

Rule 56(c) U.R.C.P. allows summary judgment and in pertinent part provides:

> The Judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, tog[illegible]

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> 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 . . .

Thus, the question is whether any material issue of fact exists.

This court has outlined the requirements for summary judgment in Bulloch v. Deseret Dodge Truck Center, Inc., 11 U.2d 1, 354 P.2d 559, 561 (1960):

> 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.

Upon reviewing the instant case, it must be remembered that this is a partial summary judgment, granted only to the extent of the difference between Plaintiff's claim and Defendant's alleged offsets. Any issue as to the validity of Defendant's offsets has been reserved for trial. A review of the evidence shows that Plaintiff is entitled to the $60,862 judgment, as Defendant has no defense or offset to that amount.

A. The Pleadings, Answers to Interrogatories and the Affidavit Do Not Present Any Material Issues of Fact.

A review of the pleadings in the instant case shows that no material issue of fact exists as to the

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amount awarded Plaintiff. Both parties acknowledge that a contract for the sum of $766,168 was entered into and that $615,490 had been paid pursuant thereto. Plaintiff then initiated this suit for the balance due under the contract as its performance was complete. Defendant denied any further liability under the contract, but when the actual defenses and counterclaims were filed, the only defense was breach of the contract by Plaintiff. It must be noted that in filing the counterclaim on the contract, the Defendant has ratified its validity. Therefore, the Defendant must pay the balance due and owing unless it can prove valid reasons for not paying.

Defendant has attempted to establish valid reasons for not paying by claiming that Plaintiff has breached the contract causing damage to Defendant. The alleged damage which the Defendant claimed was $96,646. Subsequent interrogatories and a deposition have ascertained that Defendant only alleged damages to the extent of $88,966. For purposes of its Motion for Partial Summary Judgment, Plaintiff has acknowledged that material issues of fact exist as to the $88,966 which Defendant properly put into issue. Further, Plaintiff at the hearing on the motion acknowledged that Defendant has put an additional $850 into issue by M. L. Harris' affidavit. But Plaintiff and the lower court were unable to see any issue as to the difference, as

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simple arithmetic shows that there is $60,862 due and owing to Plaintiff to which Defendant has no valid claimed offset.

Defendant quotes extensively from Burningham v. Ott, 525 P.2d 620 (Utah 1974) for the proposition that a court should not grant a summary judgment until all possible shreds of evidence are known. A more careful reading of the case demonstrates that this generous language was in the context of whether summary judgment was a harsh remedy, with the language quoted by Defendant being severely tempered by Chief Justice Ellet's conclusion:

> Gratuitous statements put in decisions to the effect that a summary judgment is a harsh remedy and should never be given if at trial a party might be able to produce evidence which would reasonably sustain a judgment in his favor, tends to cause trial judges to hesitate to grant motions for summary judgments in those cases where there are no disputed issues of material facts. The only harsh thing about summary judgments is for a trial judge to fail in his duty to apply the law and summarily decide a case where there is no disputed issues of material facts.

525 P.2d at 622 (emphasis added).

There is no requirement that all possible evidence be before the court. What is required, is that based on the evidence presented there exist no genuine issue as to a material fact. As will be demonstrated in the next section, the affidavit did not add any evidence as to material issues, and thus based on the prior pleadings no material issues of fact exist.

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B. The Affidavit Contains Only the Mere [illegible] of Affiant that Materi[illegible] Issues Exist Which is Ins[illegible]cie[illegible] to Put the Issues Into Controversy.

Discovery revealed that the Defendant claimed offsets of $88,966. However, in an attempt to defeat Plaintiff's Motion for Partial Summary Judgment Defendant asser[illegible] by affidavit filed only five days before the hearing that the offsets heretofore claimed were mere estimates and that there were other additional costs not yet ascertainable. While Rule 56(c) U.R.C.P. allows the adverse party to file affidavits up to the day before the hearing, an affidavit should not be used as a stall tactic preventing summary judgment where otherwise justified. This is especially tr[illegible] in this case where the claims in the affidavit are clearly unsubstantiated.

Utah case law clearly holds that a mere assertio[illegible] by a party that issues of fact exist is insufficient to create material issues of fact. Leninger v. Stearns-Roger Manufacturing Co., 17 U.2d 317, 404 P.2d 33 (1965), involv[illegible] a claim for personal injuries allegedly caused by defendant-contractor's negligent installation of a fan manufactured [illegible] a third party. Even though plaintiff's employer demanded installation of that type of fan, plaintiff attempted to bypass this causal factor by alleging that defendant kne[illegible] should have known of the danger inherent in the fan. The

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court upheld the trial court's granting of the summary judgment and stated:

> the plaintiff in the instant case has attempted to create factual issues, but the whole purpose of summary judgment would be defeated if a case could be forced to trial by <u>mere</u> assertion that an issue exists.

404 P.2d at 38 (emphasis added). See also Menlove v. Salt Lake City, 18 U.2d 203, 418 P.2d 227 (1966); Foster v. Steed, 19 U.2d 135, 432 P.2d 60, (1967) where this court used the same reasoning as it did in the Leninger case.

In Walker v. Rocky Mountain Recreation Corporation, 29 U.2d 274, 508 P.2d 538 (1973), plaintiff leased certain property to defendant corporation for specified remunerations. After a series of defaults and attempts to correct such, the parties entered into a settlement agreement. Plaintiff brought suit to recover the sum stipulated in the agreement, and subsequently moved for a summary judgment. Defendant filed an affidavit in opposition to the motion claiming that plaintiff had breached its fiduciary duty by entering into unconscionable contracts, that the lease was never exercised and that the settlement agreement was improper. This court upheld the trial court's granting of the summary judgment stating "a review of defendant's opposing affidavit reveals no evidentiary facts but <u>merely reflects the affiant's unsubstantiated opinions</u> and conclusions in regard to the transactions." 508 P.2d at 542 (emphasis added). Thus, since the affidavit was more

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unsubstantiated opinion it was insufficient to put issues into controversy.

As these cases illustrate, there must be more than the mere allegations of the party that issues exist--there must be substantiated claims. In the instant case, the affidavit purports to outline possible damages that may be allocated to Plaintiff. But aside from the $850 due to the engineering company, there are no substantiated claims, only mere speculation. An excellent example of such speculation occurs in paragraph 9 of the affidavit (R 120) which states:

> 9. That although he is at this time unable to provide a firm statement of the total costs in issue, it is his information and belief that said costs are in excess of those set forth in the aforesaid pleadings, deposition and answers to plaintiff in interrogatories.

Here, over a year after the roof was put on the building, the Defendant is asserting that he <u>thinks</u> there may be costs in excess of those already set forth during a lengthy discovery period. Defendant can point to no definite evidence, only a vague "upon information and belief". Such speculation should not be allowed to defeat a motion for summary judgment.

Another example which borders on the ludicrous is found in paragraph 11 of the affidavit (R 120) where Mr. Harris states:

> 11. That defendant has not yet received complete bills for labor and materials from suppliers associated with the trusses and

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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 Neiderhouser 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.

Defendant apparently argues that there may be suppliers who, over one year after supplying material and labor on the roof, have not yet submitted a bill for such work. Given suppliers' well-known desire to be paid promptly, such a billing delay is unlikely. Further, Defendant points to no specific instances where it knows that such a dilatory supplier exists. Again Defendant is only speculating.

On the other hand, Mr. Harris asserts in that same paragraph that certain suppliers' bills _may_ have portions attributable to the roof which _may_ be claimed as offsets. But Mr. Harris states that his company has not yet had time to analyze the bills to determine what portion, if any, may be charged to work on the roof. This claim by Defendant is made months after he signed answers to interrogatories which asked him to determine these very damage items. Surely the whole discovery process is a nullity if Defendant can answer interrogatories in one fashion and then, five days before a summary judgment motion is heard, allege that the answers

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are "mere estimates" and that it really hasn't had time to compile the cost information.

The trial court judge properly ruled that these mere assertions as to possible damges were not enough to create genuine issues of fact. This is a case where there are no material issues of fact, and if the mere assertions of Defendant are allowed to control "the whole purpose of summary judgment would be defeated." As this court stated in Dupler v. Yates, 10 Ut.2d 251, 351 P.2d 624, 636 (Utah 1960):

> The primary purpose of the summary judgment procedure is to pierce the allegations of the pleadings, show that there is no genuine issue of material fact, although an issue may be raised by the pleadings, and that the moving party is entitled to judgment as a matter of law.

Defendants cite Holbrook Company v. Adams, 542 P.2d 191 (Utah 1975), for the proposition that one sworn statement under oath is sufficient to put material issues into controversy. Plaintiff grants that this is the controlling rule if as in the Holbrook case, the sworn statement presents substantiated evidence. But where the affidavit contains only the mere allegations of the party, it is insufficient to create issues of fact. Holbrook is also cited for the proposition that the trial court should not weigh the evidence. Again, this is true when there is conflicting evidence before the court. Here, there was no conflicting evidence, as the mere unsubstantiated claims of Defendant should carry no evidentary value at all.

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C. Partial Summary Judgment as to Damages is Proper in this Instance.

The pleadings of this case show:

1. Plaintiff's complaint seeking payment of $150,678 due and owing on the contract.

2. Defendant's general denial of such obligation with an alleged defense only to the extent of $88,966 plus $850.

3. A difference of $60,862.00 between Plaintiff's claim and Defendant's alleged offset to which there is no valid dispute.

A motion for partial summary judgment as to the difference to which there is no valid dispute is entirely proper in this instance.

Carlson v. Milbrad, 415 P.2d 1020 (Wash. 1966) involved a sale of some restaurant property from A to B pursuant to a conditional sales contract. Upon B's default A accelerated payments and sued for the amount due and owing. B in defense claimed that there had been a release of liability as to them and that they had an offsetting claim for repairs they had to make to equipment. The trial court granted A's subsequent motion for summary judgment as to the amount due and owing, but reserved for trial the issues of release and offset. On appeal the court held the summary judgment as to damages was proper as "There being no genuine issue as to any material fact' (other than the

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alleged release and/or setoff), summary judgment was properly rendered." 415 P.2d at 1023. Thus, where the plead. etc. demonstrate that no issues of fact exist as to a part of the claim, it is proper to grant a partial summary judgment leaving the issues in controversy for trial.

In Smithers v. Ederer, 303 P.2d 771 (Cal. 1956), plaintiff brought suit for repayment of a loan of $5,000 made to defendant. As a defense, defendant claimed that the money was plaintiff's contribution to a joint venture which if unsuccessful meant plaintiff was only entitled to repayment of $2,500. Since defendant by his answer only controverted $2,500 of the claim, plaintiff moved for partial summary judgment as to the uncontroverted $2,500. The court on appeal held that summary judgment as to the uncontroverted portion of damages was proper.

Kuhn Construction Company v. State, 248 A.2d 612 (Del. 1968) is a case almost directly on point. In Kuhn, the plaintiff had finished construction pursuant to a contract and brought suit for the balance due. The defendant in effect admitted that a certain sum was due, but disputed the additional charges. The court held that partial summary judgment as to the undisputed difference was proper.

SUMMARY

Both parties have admitted the existence of the contract and partial payments thereto. So, the contro

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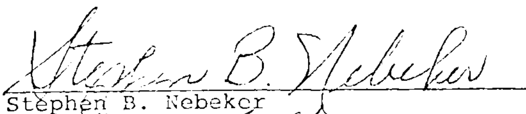
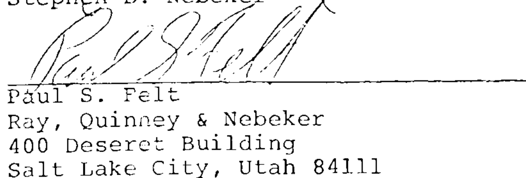
concerns the amount remaining to be paid on the contract. Plaintiff in its complaint claimed that the sum of $150,678 was due. Defendant through its answer, counterclaim, interrogatories, and deposition acknowledged the contract and only claimed offsets of $88,966. Since there was a sum of $61,712 to which no offsets were claimed, Plaintiff moved for a Partial Summary Judgment. At that time, Defendants filed an affidavit in opposition to the Motion purporting to put a larger amount of damages into controversy. Defendant claimed other additional expenses were to be allocated to Plaintiff, thus increasing the offsets. However other than a mere $850 engineering fee, the affidavit contained mere unsubstantiated speculations that other costs might be due. As Utah case law demonstrates, such mere assertions of a party are insufficient to put issues into controversy.

This case clearly warrants a partial summary judgment as there is no genuine issue as to the undisputed damages. This court should affirm the trial courts granting of the motion.

Respectfully submitted,



Stephen B. Nebeker



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the foregoing Respondents' Brief was served this ____ day of April, 1978, by mailing on said date a copy thereof by United States Mail, first class postage prepaid addressed to Elliott Lee Pratt, Attorney for Defendants-Appellants, CLYDE & PRATT, 351 South State Street, Salt Lake City, Utah 84111.

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