

1997

Elm, Inc., Plaintiff, v. M.T. Enterprises, Inc., aka M.T. Mechanical, a Utah corporation, and Morris Told, an individual, Defendant/Appellants, v. Elm, Inc., Plaintiff/Appellee : Response to Petition for Rehearing

Utah Court of Appeals

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DOCKET NO. 970578-CA

IN THE UTAH COURT OF APPEALS

ELM, INC.,

Plaintiff,

v.

M.T. ENTERPRISES, INC., aka M.T.
MECHANICAL, a Utah corporation,
and MORRIS TOLD, an individual,

Defendant/Appellants,

v.

ELM, INC.,

Plaintiff/Appellee.

Civil No. 970578-CA

District Court Case No.
950400414CV

APPELLEE ELM, INC.'S RESPONSE TO APPELLANTS' PETITION FOR
REHEARING

On Appeal From Fourth Judicial District Court of Utah County, State of Utah
The Honorable Howard Maetani, District Judge

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Julia D'Alesandro
Clerk of the Court

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Appellee ELM, Inc. (“ELM”), by and through its counsel of record, Ray, Quinney & Nebeker, hereby responds, pursuant to the directive of this Court dated November 20, 1998, to the Petition for Rehearing filed by Appellants M.T. Enterprises, Inc. (“MT”) and Morris Told (“Told”) (collectively referred to as “MT”) dated November 12, 1998.

INTRODUCTION

MT seeks a rehearing before this Court on the basis that the Court failed to properly interpret federal law pertaining to the submission of certified reports on wages paid to individuals working on federal construction projects. MT’s argument purposefully ignores the clear language and express intent of the federal law and regulations. Secondly, MT ignores the contractual relationship that existed between MT and ELM and the contractual relationship between MT and the principal contractor – Control, Inc. MT attempts to fortify the distortion of the relationship between MT and Control by slipping in unsubstantiated and unwarranted representations about what Control may or may not have testified to. Petition for Rehearing at 5. The conclusion made by the Court is correct and should be reaffirmed.

ARGUMENT

- I. THE PLAIN LANGUAGE OF THE RELEVANT STATUTE AND REGULATIONS REQUIRES THAT THE WAGE STATEMENT BE FURNISHED AND EXECUTED BY THE CONTRACTOR OR SUBCONTRACTOR OR BY ITS AUTHORIZED OFFICER OR EMPLOYEE.

This Court did not err in concluding that federal law does not impose a duty upon ELM to provide the required payroll records. In arguing that only an officer or payroll supervisor of ELM could execute the required wage statements, MT ignores the plain language of 29 C.F.R. § 3.3(b). That regulation states: “Each contractor or subcontractor shall furnish each week a statement with respect to wages paid each of its employees. . . .” 29 C.F.R. § 3.3(b) (1998). MT was a mechanical subcontractor which provided labor and materials for the construction of the Veterans Administrative Hospital in Salt Lake City. The general contractor supervising the construction was Control, Inc. ELM was neither the general contractor nor a subcontractor. MT was the subcontractor which supervised and directed the on-site workers.

MT entered into an agreement with ELM whereby ELM would be responsible for paying MT’s workers and performing other related administrative matters (e.g., payment of benefits, etc.). ELM had no responsibility for the actual work performed by the workers; that responsibility remained with MT. ELM was

responsible for paying the workers and MT was responsible for supervising the workers. In essence, the MT workers on the Veterans Administrative Hospital project had two employers: MT with respect to the actual work and ELM with respect to compensation for the work.

“An employee of one person can become the employee of another person alternately, simultaneously, wholly, or partially.” 27 Am. Jur. 2d, Employment Relationship, §6 (1996). Unfortunately, the federal statute and regulations at issue do not define the term “employee,” nor does any case law shed light on the issue.

However, 29 C.F.R. § 3.2 does provide guidance. It states in subsection (e):

Every person paid by a contractor or subcontractor in any manner for his labor in the construction, prosecution, completion, or repair of a public building or public work or building or work financed in whole or in part by loans or grants from the United States is “employed” and receiving “wages” regardless of any contractual relationship alleged to exist between him and the real employer.

29 C.F.R. § 3.2 (e) (1998) (emphasis added). This section acknowledges that an employee can have more than one employer. Even though ELM ultimately issued the checks to the laborers, those laborers were nonetheless employees of MT because they received payment by means of MT’s contract with ELM. More specifically, ELM agreed to pay the leased employees’ wages, benefits, insurance, and workers’ compensation in exchange for 112.50% of the gross payroll ELM

paid the leased employees. Under the contractual arrangement, MT paid ELM which then paid the laborers. Therefore, the money used to pay the laborers originated with MT. According to 29 C.F.R. § 3.2(e), MT was an employer.

MT states that the laborers were ELM's employees "and only ELM's employees." The facts clearly show that even if the laborers were employees of ELM, they were also employees of MT, thereby creating a dual employment relationship. While the laborers were working, they were under the direct supervision and control of MT, not ELM. It was MT that told the laborers what to do and had the authority to terminate their employment if their work was unsatisfactory. It was MT that had the direct knowledge of who was working, the hours that were being worked, and the work that was being done. It is only logical that MT should have been the one to submit the wage statements as it had the most direct knowledge of the facts necessary to complete them. Furthermore, ELM had to obtain from MT the information necessary to pay the laborer, such as number of hours worked, overtime, sick pay, etc.

In conclusion, the laborers at issue were clearly employees of MT. According to the plain language of the regulations, it is the contractor or subcontractor (i.e., MT) that must provide the wage statements of its employees. MT, not ELM, was responsible for providing those statements unless MT made

arrangements for ELM to prepare and submit certified payrolls, which MT did not do. See Opinion at 5. This Court therefore, should affirm its original decision holding that ELM had no duty to complete the wage statements, and refuse to grant Appellant's Petition for Rehearing.

II. MT PERSISTS IN INTRODUCING UNSUBSTANTIATED STATEMENTS AND ALLEGATIONS THAT ARE NOT PART OF THE TRIAL COURT RECORD.

This Court has been very charitable to MT when it described the federal law issue discussed above as having been “raised rather obliquely”. Opinion at 5. At the time of trial, MT’s counsel never provided a copy of the federal statute that ELM supposedly offended. Throughout the briefing to this Court, MT failed to provide a single reference to any statutory provision that might have created such a duty to provide certified payrolls. It was not until the oral argument before this Court that counsel for MT gifted the Court and opposing counsel with a reference to the law that supposedly created the obligation for ELM.

In order to resolve any ambiguity or question about the matter, this Court generously “examined federal statutes and regulations not previously provided by M.T. to either the trial court of this court.” Opinion at 6. MT takes issue in MT’s Petition for Rehearing with the conclusion reached by the Court. In its effort to divert the Court’s attention from the plain language of the statutes and regulations,

MT refers to facts and allegations that simply never appear in the record. More specifically, MT states:

It was for this reason that Control would not allow MT to execute certified payrolls for ELM' employees. Control would only accept payroll statements which had been executed by an officer of ELM, or by the employee of ELM who "supervised[d] the payment" by ELM "of wages" to the ELM employees which MT leased.

Petition for Rehearing at 5.

No one from Control ever testified at the trial. No affidavits or declarations from Control were ever offered into evidence at any stage of the litigation in the trial court. No one from Control ever gave a deposition in this matter. Quite simply, there is no testimony or evidence from anyone at Control.

MT now wants this Court to countenance these unsubstantiated allegations in a Petition for Rehearing. MT wants this Court to believe that the third party general contractor on the VA Hospital project somehow communicated to MT that Control would not accept the certified payrolls if executed by MT rather than ELM. MT has waived its opportunity to offer such testimony when it failed to introduce such evidence at the time of trial. To even consider this argument concerning the alleged rejection of the certified payrolls by Control is to sanction MT's presentation of a moving target for the Court's consideration. The time and place for such evidence was at trial. MT failed to provide such evidence, and it

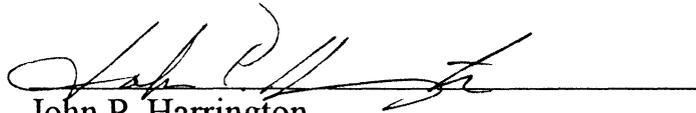
shouldn't be allowed to subvert the appellate process by referring to such allegations now. ELM needs to have this matter brought to a close.

SUMMARY

MT's Petition for Rehearing should be denied because it has not offered a plausible interpretation of the pertinent statutes that might require ELM to provide certified payrolls. Secondly, the Court should reject any unsubstantiated allegations concerning the acceptance or rejection of certified payrolls by Control.

DATED this 11th day of December, 1998.

RAY, QUINNEY & NEBEKER


John P. Harrington
Attorneys for Appellee ELM, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of APPELLEE ELM, INC.'S
RESPONSE TO APPELLANTS' PETITION FOR REHEARING was mailed,
postage prepaid in the United States mail, this 11th day of December, 1998, to:

Brian W. Steffensen
Steffensen McDonald Steffensen
2159 South 700 East, Suite 100
Salt Lake City, Utah 84106

A handwritten signature in black ink, appearing to read "Brian W. Steffensen", written over a horizontal line.

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