

1988

Estate Landscape and Snow Removal Specialists v. The Mountain States Telephone and Telegraph Company : Reply Brief

Utah Court of Appeals

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DOCKET NO. 880428

IN THE UTAH COURT OF APPEALS

ESTATE LANDSCAPE AND SNOW	:	
REMOVAL SPECIALISTS, INC.,	:	
Plaintiff and Respondent,	:	Case No. 880428-CA
vs.	:	
THE MOUNTAIN STATES TELEPHONE	:	Argument Priority
AND TELEGRAPH COMPANY,	:	No. 14b
Defendant and Appellant.	:	

REPLY BRIEF OF APPELLANT
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

Appeal from a judgment of the Third Judicial District Court
in and For Salt Lake County, State of Utah, The Honorable
Timothy R. Hanson, District Court Judge, presiding.

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Attorney for Defendant-Appellant
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ARGUMENT

Respondent Estate Landscape and Snow Removal, Inc. ("Estate") mischaracterizes the transaction between the parties as a series of "separate jobs,"¹ each constituting "in essence"² a separate contract. This common but transparent attempt to avoid the accord and satisfaction defense is out of harmony not only with the law, but with Estate's own evidence.

In its brief, Estate has the audacity to assign a job number to each supposed "job,"³ although there is absolutely no evidential basis in the record for doing so. On the contrary, all the evidence shows that Estate itself treated the relationship with Mountain Bell as a unitary contract. First, there was a single written contract, which Estate concedes set the terms as to all snow removal work to be performed.⁴ By its terms, that contract contemplated snow removal for an entire year, not just for a single occasion.⁵

¹ Respondent's Brief, pp. 1-8.

² Respondent's Brief, p. 3.

³ Respondent's Brief, p. 3.

⁴ Respondent's Brief, p. 3.

⁵ The contract (Exhibit 3, attached to Mountain Bell's principal brief as Appendix D), provides: "Such services shall commence under this Agreement on December 1, 1984, and continue through and including November 31, 1985."

Second, there was a single bill for all the work done under the contract at Alta, Utah, during the period from December 28, 1984 through April 1, 1985, when the snow season ended.⁶ That invoice was submitted after all the work was completed, and although it itemized the services supposedly performed, it stated the amount due as a single figure, \$30,162.50. Third, Estate's own ledger showed a single account for Mountain Bell, which stated that same figure as the last balance owing.⁷ Fourth, the demand letter from Estate's attorney did not refer to multiple contracts, but to a "snow removal contract," an "outstanding balance," an "outstanding obligation," and an "outstanding account," each in the singular.⁸ Finally, both the complaint and the amended complaint referred to the agreement between the parties in the singular.

In seeking to contort the facts of this case into the mold of Dillman v. Massey Ferguson, Inc., 13 Utah 2d 142, 369 P.2d 296 (1962), Estate has conveniently ignored the statement in Marton Remodeling v. Jensen, 706 P.2d 607, 609 (Utah 1985), that "a single claim, including both its

⁶ A more legible copy of the invoice (Exhibit 4) is attached hereto as Attachment A.

⁷ Exhibit 5, attached hereto as Attachment B.

⁸ Exhibit 14.

disputed and undisputed elements, is unitary and not subject to division so long as the whole claim is unliquidated."

(emphasis added) (citing Air Van Lines Inc. v. Buster, 673 P.2d 774, 778 (Alaska 1983)). Estate has also ignored the compelling factual similarity among the case at bar, Marton, and Cove View Excavating & Construction Co., Inc. v. Flynn, 758 P.2d 474 (Utah App. 1988). Each of those cases involved services performed on a contract, where the compensation depended at least in part on the amount of time spent on the job. In each case, the defendant disputed the amount of time claimed by the plaintiff, and tendered a check representing what the defendant felt was proper payment for the whole job. Neither the Supreme Court in Marton, nor the Court of Appeals in Cove View, took the approach advocated by Estate in this case, to sever the claims into two portions, one of which represented the amount the defendants conceded was due, and the other of which represented the "disputed" portion. Rather, in both cases the courts specifically rejected the same argument Estate is making in this case (that there were multiple claims), and applied the doctrine of accord and satisfaction to dismiss the plaintiffs' claims.

In Bench v. Bechtel Civil & Minerals, Inc., 758 P.2d 460 (Utah App. 1988), this Court followed the same reasoning in holding that an accord and satisfaction occurred when an

employee cashed a check with the notation "in settlement of net final wages from job 11967/Jubail." The check included the full amount of certain elements of compensation that the employer conceded were due, but excluded any payment for "uplifts," which the plaintiff claimed were owing as separate items of compensation. Although such claims could have been severed in the manner sought by Estate in this case, this Court held that the case involved "a single claim for compensation," distinguishing Bennett v. Robinson's Medical Mart, Inc., 18 Utah 2d 186, 417 P.2d 761 (1966) (which found two separate claims for compensation). 758 P.2d at 462.

Cases from other jurisdictions have similarly rejected claims that separate items on a single invoice for work under a single contract can be treated as separate contracts to avoid a finding of accord and satisfaction. In Air Van Lines Inc. v. Buster, 673 P.2d 774, 778 (Alaska 1983), cited with approval in both Marton and Cove View, the plaintiff moving company had sent an itemized invoice following completion of a moving job. Defendant objected to two of the four items on the invoice (the charges for overtime hours and for per diem and travel), but conceded the remaining charges (for regular time and for packing materials). Defendant's full payment check represented the conceded charges only. The court held that cashing the check constituted an accord and satisfaction

of the entire invoice, specifically rejecting the same argument that Estate makes in this case (that payment of the undisputed portion of the bill is not an accord and satisfaction as to the disputed portion.)

In Flagel v. Southwest Clinical Physiatrists, P.C., 157 Ariz. 196, 755 P.2d 1184 (1988), the plaintiff, a physical therapist, agreed to work for the defendant as an independent contractor. His agreed compensation depended in part on the revenue collected by the defendant. When the defendant decided not to renew the contract, a dispute arose as to whether the plaintiff was entitled to a percentage of the existing accounts receivable or of the amounts actually collected prior to termination of his contract. The court held that cashing the defendant's full payment check, which represented the amount the defendant conceded was due under its interpretation of the contract, was an accord and satisfaction of the whole dispute, notwithstanding that there were two distinct claims (based on revenues received before and after termination). The court concluded: "[Plaintiff's] claims to revenues received before and after his termination are not wholly independent claims arising out of separate transactions." Id. at 1190.⁹

⁹ The court also rejected the plaintiff's argument that the great disparity between the amount paid (\$2,803.00) and the amount claimed (\$37,810.00) indicated that the plaintiff

In Graffam v. Geronda, 304 A.2d 76 (Me. 1973), the plaintiff delivered 500 cases of oil to defendant. Defendant sold 42 cases, and returned the remaining 458 cases to plaintiff, with a check representing full payment only for the cases sold. The check bore the notation: "Full and final payment for product received December 18, 1969." The court held that cashing the check created an accord and satisfaction, specifically concluding that there was but a single claim.

Legal scholars acknowledge the principles set forth in the cases previously cited. For example, 1 Williston on Contracts § 129 (3d ed. 1957) states:

Not infrequently, though a claim is unliquidated or the subject of a bona fide and reasonable dispute, it is conceded that at least a certain amount is due. While it would appear that in paying this conceded part of the claim, the debtor was merely doing what he was previously bound to do, the law looks upon an unliquidated or disputed claim as a whole and does not attempt to set a value upon it, or to define the extent of the debtor's legal obligation. . . . By the weight of authority, the payment of the amount admittedly due will support a promise to discharge the whole claim.

could not have agreed to accept the lesser amount in full settlement. The court observed that

[defendant] clearly expressed its intent that the check was paid as a settlement in full. It may be that [plaintiff] did not assent and there was no actual meeting of the minds. However, the making of a contract in this circumstance does not require such an actual meeting of the minds. As a matter of law, an accord and satisfaction occurred when [plaintiff] cashed the check.

755 P.2d at 1190-91.

See also, 15 Williston on Contracts § 1854 (3d ed. 1972).

In Comment (c) to Restatement (Second) of Contracts, § 74 (1981), it is stated thus:

An undisputed obligation may be unliquidated, that is uncertain or disputed in amount. . . . An admission by the obligor that a minimum amount is due does not liquidate the claim even partially unless he is contractually bound to the admission. . . . If there are no circumstances of unfair pressure or economic coercion and a disputed item is closely related to an undisputed item, the two are treated as making up a single unliquidated claim; and payment of the amount admittedly due can be consideration for a promise to surrender the entire claim.

See also, Annotation, "Payment of undisputed amount or liability as consideration for discharge of disputed amount or liability," 112 A.L.R. 1219, 1225-36 (1938).

Corbin provides two illustrations where an unliquidated claim comprised of several distinct elements may be resolved by a single accord and satisfaction:

(2) A rate of payment per unit of performance may have been agreed upon by the parties; but the number of units may be undetermined or disputed. It may have been agreed that A shall be paid \$5 per day for his service, but the number of days that he has worked is undetermined or disputed. . . . The amount due is unliquidated and doubtful; and a mutual agreement fixing the amount is an enforceable contract, whether it is a substituted contract or an accord executory.

. . . .
(4) The terms of the contract or the meaning to be given them may be doubtful and disputed. The performance rendered may be definite and certain, but the amount to be paid therefor is in dispute, whether that amount was a lump sum or a sum to be determined at a rate per unit. . . . According to the weight of authority, if the debtor tenders payment of the exact amount that he has admitted to be due, making it clear

that he offers it as satisfaction in full of the creditor's claim, the acceptance of the tendered payment operates as accord and satisfaction of the whole.

6 Corbin on Contracts § 1290, pp. 168-70 (1962).

The present case provides an ideal illustration of the principles enunciated above. There is no dispute that Estate performed some snow removal work at Alta, Utah, pursuant to a contract that provided for payment on a per unit basis.¹⁰ There was, however, a genuine, substantial dispute over the amount charged. Mountain Bell's tender of payment of the difference between the disputed portion and the total bill was intended to resolve the entire dispute.¹¹ That intent was clearly conveyed to Estate,¹² and Estate understood or

¹⁰ The contract specified \$85 per removal, or \$55 [per hour] for use of a front end loader. See Exhibit 3, attached to Mountain Bell's principal brief as Appendix D.

¹¹ Tripp Transcript of Jan. 13 at 43-44.

¹² Mountain Bell's letter (Exhibit 6, attached to Mountain Bell's principal brief as Appendix F) offered the check as "payment in full for satisfaction of contracted services." It did not state that the check represented payment for undisputed services. Thus the case at bar is factually distinguishable from Dillman, where the debtor's notation (that the check represented "the amount in full to complete recent buy back on your account") was vague enough that the reviewing court held that "the trial court could believe . . . that the check was in no way related to anything other than payment for items actually bought back by appellant." 369 P.2d at 298. There is no rational way to read Mountain Bell's letter as being similarly vague or limited.

should have understood the import of it.¹³ Under these circumstances, applicable legal authority compels the conclusion that there was an accord and satisfaction when Estate negotiated the check.

Not only is Estate's position contrary to recent case law in Utah and other jurisdictions, it is also contrary to sound policy. Under Estate's theory, one who makes the awful mistake of identifying those portions of an itemized invoice that are disputed runs the risk that the court will treat the disputed items as being under a separate contract or contracts, thereby preventing the application of accord and satisfaction to resolve the whole bill. Thus in order to avoid such a result and to enhance the chance of achieving an accord and satisfaction, the debtor should not specify what is disputed nor provide any information as to how or why the amount being offered in full settlement was calculated, but should simply advise the creditor that the whole bill is disputed. Better yet, one should pick an arbitrary, round figure to offer in settlement, so there would be no means of inferring from the amount offered what was disputed and what

¹³ Mountain Bell's letter specifically warned Estate: "If you are not willing to accept that sum, \$8613.00 in full satisfaction of the sums due, DO NOT negotiate the check, for upon your negotiation of that check, we will treat the matter as fully paid."

was not. Such an approach makes no sense from a commercial or a legal standpoint.

CONCLUSION

In summary, the only contention raised by Estate as a basis for denying the accord and satisfaction defense, that each "job" of snow removal work constituted a separate contract, is without merit both factually and legally. Estate's other points are so lacking in substance and merit that they do not deserve further attention. Estate's conclusion that the trial court's decision was "well within the bounds of his discretion"¹⁴ even misstates the applicable standard of review. On the undisputed evidence in the record of this case, Mountain Bell is entitled to a finding that there was an accord and satisfaction, and on that basis the action should be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 29th day of December, 1988.

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY

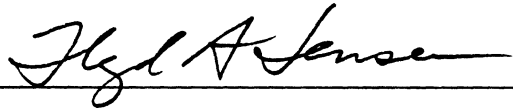
By Floyd A. Jensen
Floyd A. Jensen, Attorney

¹⁴ Respondent's Brief, p. 12.

MAILING CERTIFICATE

I hereby certify that four (4) true and correct copies of the foregoing Reply Brief of Respondent were mailed, postage prepaid, to the following on the 29th day of December, 1988:

Lowell V. Summerhays, Esq.
David D. Loreman, Esq.
Attorneys for Plaintiff-Respondent
480 East 6400 South
Murray, Utah 84107



ATTACHMENTS

- A. Invoice from Estate to Mountain Bell
- B. Estate's ledger for Mountain Bell account

ATTACHMENT A

Invoice from Estate to Mountain Bell

**INVOICE***Estate***"Landscape and Snow Removal Specialists"****SHIP TO** 3089 Little Cottonwood Road
Sandy, Utah 84092

942-5431

Mt. Bell 8
4747 North 7th Street #212
Phoenix, AZ. 85014
Attn: Jane PO#06110106
Alta Canyon

INVOICE DATE

INVOICE NUMBER

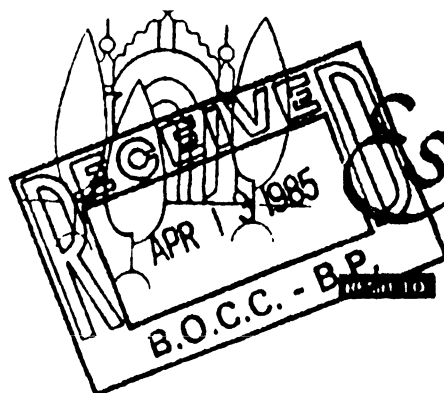
04/01/85

3765

QUANTITY	DESCRIPTION	AMOUNT
1	Snow Removal with front-end loader & 3 dumps units with plows. 18 Hrs 12-28 thru 12-30-84	3960.00
1	Snow Removal Service 12-31-84	85.00
1	Snow Removal Service 1-1-85	85.00
3	Snow Removal Service (1) AM - (2)PM 1-8-85	255.00
3	Snow Removal Service (2) AM - (1) PM 1-9-85	255.00
3	Snow Removal Service (2) AM - (1) PM 1-21-85	255.00
1	Snow Removal with front-end loader & 2 dump units with plows. 10 Hrs. 1-26-85	1650.00
1	Snow Removal Service (2) AM - (3) PM 1-29-85	425.00
RENT	1 - 30 DAYS 31 - 60 DAYS 61 - 90 DAYS OVER 90 DAYS	TOTAL DUE

Net 10 Days.

Prompt payment would be appreciated. THANK YOU.



Estate

"Landscape and Snow Removal Specialists"

3089 Little Cottonwood Road
Sandy, Utah 84092

942-5431

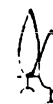
Mt. Bell 8
4747 North 7th Street #212
Phoenix, AZ. 85014
Attn: Jane PO#06110106
Alta Canyon

INVOICE DATE	INVOICE NUMBER
04/01/85	3765

QUANTITY	DESCRIPTION	AMOUNT
4	Snow Removal Service (1) AM - (3) PM 1-30-85	340.00
2	Snow Removal Service (1) AM - (1) PM 2-1-85	170.00
6	Snow Removal Service (3) AM - (3) PM 2-4-85	510.00
5	Snow Removal Service (3) AM - (2) PM 2-5-85	425.00
5	Snow Removal Service (3) AM - (2) PM 2-6-85	425.00
6	Snow Removal Service (4) AM - (2) PM 2-7-85	510.00
4	Snow Removal Service (3) AM - (1) PM 2-8-85	340.00
1	Snow Removal with front-end loader & 2 dump units with plows. - 24 Hrs. 2-11 thru 2-12-85	3960.00
	Snow Removal with front-end loader & 2 dump units	
CURRENT	1 - 30 DAYS	31 - 60 DAYS
	61 - 90 DAYS	OVER 90 DAYS
	TOTAL	DUE

Net 10 Days.

Prompt payment would be appreciated. THANK YOU.





INVOICE

"Landscape and Snow Removal Specialists"

3089 Little Cottonwood Road
Sandy, Utah 84092

942-5431

Mt. Bell 8
4747 North 7th Street #212
Phoenix, AZ. 85014
Attn: Jane PO#06110106
Alta Canyon

INVOICE DATE

INVOICE NUMBER

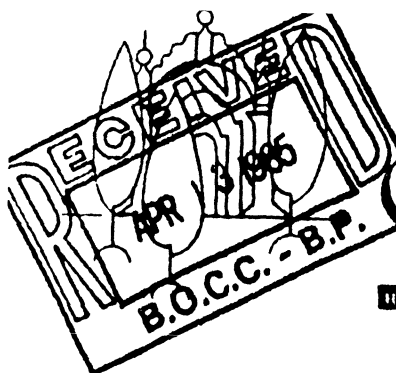
04/01/85

3765

QUANTITY	DESCRIPTION	AMOUNT
1	with plows. (Avalanche) 18.5 Hrs. 2-13-85	3052.50
2	Snow Removal Service (1) AM - (1) PM 2-15-85	170.00
3	Snow Removal Service (2) AM - (1) PM 2-18-85	255.00
	Snow Removal with front-end loader and 2 dump units	
1	with plows. 16.5 Hrs. 2-20-85	2722.50
2	Snow Removal Service (2) PM 2-21-85	170.00
2	Snow Removal Service (1) AM - (1) PM 2-22-85	170.00
2	Snow Removal Service (2) AM 2-23-85	170.00
2	Snow Removal Service (2) PM 2-25-85	170.00
2	Snow Removal Service (2) AM 2-26-85	170.00
CURRENT 1 - 30 DAYS 31 - 60 DAYS 61 - 90 DAYS OVER 90 DAYS		TOTAL DUE

Net 10 Days.

Prompt payment would be appreciated. THANK YOU.



Estate

"Landscape and Snow Removal Specialists"

MEMO TO 3089 Little Cottonwood Road
Sandy, Utah 84092

942-5431

Mt. Bell 8
4747 North 7th Street #212
Phoenix, AZ. 85014
Attn: Jane PO#06110106
Alta Canyon

INVOICE DATE	INVOICE NUMBER
04/01/85	3765

QUANTITY	DESCRIPTION	AMOUNT
3	Snow Removal Service (1) AM - (2) PM 3-2-85	255.00
6	Snow Removal Service (3) AM - (3) PM 3-3-85	510.00
3	Snow Removal Service (2) AM - (1) PM 3-4-85	255.00
3	Snow Removal Service (3) AM - (2) PM 3-6-85	425.00
2	Snow Removal Service (2) AM 3-7-85	170.00
1	Snow removal with front-end loader and 2 dump units with plows 12.5 Hrs. 3-8 thru 3-9-85	170.00 2062.50
2	Snow Removal Service (2) PM 3-10-85	170.00
6	Snow Removal Service (3) AM - (3) PM 3-11-85	510.00
3	Snow Removal Service (3) AM - (2) PM 3-12-85	425.00
TOTAL DUE		

Net 10 Days.
Prompt payment would be appreciated. THANK YOU.



Estate

"Landscape and Snow Removal Specialists"

REMIT TO

3089 Little Cottonwood Road
Sandy, Utah 84092

942-5431

Mt. Bell 8
4747 North 7th Street #212
Phoenix, AZ. 85014
Attn: Jane PO#06110106
Alta Canyon

INVOICE DATE

INVOICE NUMBER

04/01/85

3765

QUANTITY	DESCRIPTION	AMOUNT
1	Snow removal with front-end loader & 2 dump units with plows. 9 Hrs. 3-13-85	1485.00
2	Snow Removal Service (2) AM 3-14-85	170.00
3	Snow Removal Service (1) AM - (2) PM 3-16-85	255.00
3	Snow Removal Service (2) AM - (1) PM 3-18-85	255.00
3	Snow Removal Service (2) AM - (1) PM 3-20-85	255.00
2	Snow Removal Service (1) AM - (1) PM 3-22-85	170.00
3	Snow Removal Service (1) AM - (2) PM 3-25-85	255.00
1	Snow Removal Service (1) AM 3-26-85	85.00
5	Snow Removal Service (3) AM - (2) PM 3-27-85	425.00
CURRENT	1 - 30 DAYS 31 - 60 DAYS 61 - 90 DAYS OVER 90 DAYS	TOTAL DUE

Net 10 Days.

Prompt payment would be appreciated. THANK YOU.



RE MI 10

942-5431

INVOICE DATE:

INVOICE NUMBER

04/01/85

3765

**TOTAL
DUE**

Prompt payment would be appreciated. THANK YOU.

ATTACHMENT B

Estate's ledger for Mountain Bell account

5



MT Bell

DATE	INVOICE #	DEBIT	CREDIT	ACCOUNT BALANCE
2/11	3581	810.00		4915.00
2/11	3638 2	850.00		5765.00
3/11			4915.00	850.00
3/9	3670 3	900.00		1750.00
3/9	3671 3	900.00		2650.00
3/9	3709 3	1575.00		4225.00
3/9	3695 4	625.00		4850.00
3/9	3752 4	1620.00		6470.00
3/9	3751 4	780.00		7250.00
3/25			850.00	6400.00
3/28			3375.00	3025.00
3/9	3758 5	500.00		3525.00
3/9	3759 5	1275.00		4800.00
4/01	3765	30162.50		34962.50
4/11			3025.00	31937.50
4/24			1775.00	30162.50
4/01	3775	1120.00		30282.50
4/01	3774	160.00		30342.50
4/17	3769	850.00		31192.50
5/21			850.00	30342.50
6/3			1180.00	30162.50

TE	INVOICE #	DEBIT	CREDIT	ACCOUNT BALANCE
1	3401	900.00		900.00
4	3436	1505.00		2405.00
1	3301	7373.75		9778.75
			9778.75	0.00
	3493	70.00		70.00
	3559	2865.00		2935.00
			70.00	2865.00
			2865.00	0.00
	3615 1	2435.00		2435.00
	3602 1	800.00		3235.00
	3580 1	870.00		4105.00