

1988

James Constructors, Inc. v. Salt Lake City Corporation : Reply Brief

Utah Court of Appeals

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UTAH
DOCUMENT

IN THE UTAH COURT OF APPEALS

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DOCKET NO.

88-0502

JAMES CONSTRUCTORS, INC.,

Plaintiff and Appellant,

v.

SALT LAKE CITY CORPORATION,

Defendant and Respondent.

Case No. 880502-CA
Priority No. 14(b)

SALT LAKE CITY CORPORATION,
a municipal corporation of the
State of Utah,

Plaintiff,

v.

JAMES CONSTRUCTORS, INC., a
Nevada Corporation, HOOD
CORPORATION, a California
corporation, and INDUSTRIAL
INDEMNITY COMPANY, a California
corporation,

Defendants.

APPELLANT'S REPLY BRIEF

Appeal from a Final Judgment of the
Third Judicial District Court of Salt Lake County
The Honorable David S. Young presiding

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FILED

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May 1, 1988

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IN THE UTAH COURT OF APPEALS

JAMES CONSTRUCTORS, INC.,)	
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Plaintiff and Appellant,)	
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)	Priority No. 14(b)
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<hr/>		
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a municipal corporation of the)	
State of Utah,)	
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JAMES CONSTRUCTORS, INC., a)	
Nevada Corporation, HOOD)	
CORPORATION, a California)	
corporation, and INDUSTRIAL)	
INDEMNITY COMPANY, a California)	
corporation,)	
)	
Defendants.)	

APPELLANT'S REPLY BRIEF

SUMMARY OF ARGUMENT

Appellant, James Constructors, Inc. ("James"), submits this reply brief for the purpose of answering new matters that were raised in the brief of respondent, Salt Lake City Corporation (the "City").

The City has argued that, (1) James made no showing before the district court which would suggest the existence of any issue of fact relative to dismissal of its complaint; (2) theories of rescission and quantum meruit are raised for the first time on appeal; (3) the question of ambiguity of the contract was not raised in the court below; and (4) the court lacks jurisdiction because James's notice of appeal was not filed within the time required by Rule 4, Rules of the Utah Supreme Court.

Whether there are issues of fact that would preclude granting of summary judgment is implicit in every motion for summary judgment, because one cannot be granted unless there is no genuine issue of material fact. Moreover, James's "Memorandum in Opposition to Salt Lake City Corporation's Motion for Partial Summary Judgment," devotes thirteen paragraphs to facts it contends have a bearing upon the interpretation of the contract. In those thirteen paragraphs, contract provisions are cited which suggest an ambiguity in the contract in that they appear to be contrary to contractual provisions relied upon by the City (R.64-70). It is certainly clear that James and the City take differing views of the interpretation of the contract based upon various contractual provisions.

The complaint filed by James refers specifically to the wrongful termination of its contract with the City (R.5), and

paragraph 22 of the complaint sets out conduct of the City which constitutes total breach of the contract (R.7).

The City's argument that the question of which party had the duty to select bedding material and backfill is involved only in the complaint of the City against James, which has not yet been determined, is not correct. Paragraph 10 of James's complaint raises the very question of who had the duty to determine which material was to be used for bedding and backfill (R.4).

On page 13 of its memorandum (R.66), James argued to the trial court that it was entitled to rescission of its contract and compensation in quantum meruit for the services performed.

James was not obligated to appeal from the judgment entered on May 4, 1988, inasmuch as that judgment was modified by a subsequent judgment entered on June 1, 1988. The trial court had jurisdiction to enter the judgment of June 1, 1988, and if it did so erroneously, because the amendment came after the ten-day period prescribed by rule, this was error only and did not affect the jurisdiction of the appellate courts. Moreover, if it were error, it was invited error, the City having prepared and presented to the court the findings of fact, conclusions of law and judgment entered June 1, 1988; and if it were error, it is error that is being raised for the first time on appeal and should not be considered by the court. There was no cross-appeal.

ARGUMENT

I.

The Questions of Ambiguity of the Contract and Whether There Was Any Genuine Issue of Material Fact Were Properly Before the Trial Court, and Were Not Raised for the First Time on Appeal.

Rule 56(c), Utah Rules of Civil Procedure, sets out the conditions for granting a summary judgment:

* * * 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 City has suggested in its argument that there was no issue of fact because no affidavit was filed by James, but affidavits are not necessary if factual matters are shown by the pleadings, depositions, answers to interrogatories, and admissions on file. Here the record is replete with discovery accomplished prior to the hearing on the motion for summary judgment, and deposition testimony is appended to James's memorandum. The very fact that James referred these factual matters to the court suggests that there are issues of fact bearing upon interpretation of the contract. There are many cases in which cross-motions for summary judgment are made, each party contending that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. But the fact

that both parties so contend does not relieve the court of its obligation to determine whether there is a genuine issue of material fact, because the absence of such an issue is the sine qua non for summary judgments. In Amjacs Interwest, Inc. v. Design Associates, 635 P.2d 53, 55 (Utah 1981), our Supreme Court, speaking through Justice Stewart, said:

As an initial consideration, we know that the filing of cross-motions for summary judgment does not mean that this case may be finally disposed of as a matter of law. Cross-motions for summary judgment do not ipso facto dissipate factual issues even though both parties contend for the purposes of their motion that they are entitled to prevail because there are no material issues of fact.

The opinion then quotes a particularly apt statement from 6 Moore's Federal Practice ¶ 56.13 at 341-344 (2d Ed. 1976).

II.

Questions of Restitution and the Right to Recover on a Quantum Meruit Theory Were Not Raised for the First Time in this Appeal.

The City has argued that the question of who had the obligation to determine whether bedding and backfill material was suitable for use on the project was not involved in James's claim against the City, but only in the City's claim against James, which has not yet been determined.

James's complaint (R.3-5) contains the following averments:

7. Defendant's engineer or other representatives were required to test the native soil removed from the pipeline trench to determine its suitability for bedding and

backfilling purposes. Defendant was under a duty to inform plaintiff of the soil test results and failed to do so.

8. Pursuant to the contract, plaintiff was obligated to compact all bedding and backfill material to comply with standards set forth in the contract documents. Defendant's engineer or other representatives were required to test the compaction of the bedding and backfill to determine compliance with the the contract specifications. Defendant was under a duty to inform plaintiff of the compaction test results and failed to inform plaintiff of any deficiencies concerning compaction test results in a timely manner.

* * *

10. Defendant was under a duty to authorize the plaintiff to use bedding material, imported backfill material when native material would not meet contract specifications. Defendant breached this duty to plaintiff, resulting in certain areas of trench failure and possible damage to the pipe.

The following points were raised in James's memorandum to the trial court:

1. Responsibility for selection of bedding and backfill was placed on the City by the terms of the contract (R.658);

2. The City is responsible for any failure due to insufficiency of the native bedding and backfill and impliedly warranted that the native bedding and backfill specified in the contract was sufficient (R.660);

3. James was entitled to rely upon results of compaction tests communicated to it by representatives of the City (R.662);

4. Exculpatory contract boiler plate contained in the general provisions cannot modify the contract technical provisions (R.665);

5. James was entitled to rescission of its contract and to compensation in quantum meruit for services performed (R.666);

6. James is entitled to payment for extra work claims alleged in its complaint under a theory of quantum meruit (R.668).

At R.669 it is pointed out in the argument that the City's action constituted a repudiation or total breach of the contract.

III.

The Notice of Appeal was Filed Within the Time Required by the Rules of the Utah Supreme Court.

An order of partial summary judgment was entered by the court on May 4, 1988, but it was not a final judgment because it did not dispose of the entire case. Thereafter, on May 17, 1988, the court signed and filed a certificate as required by Rule 54(b), U.R.Civ.P., which made the judgment of May 4, 1988, a final judgment for purposes of appeal. Almost immediately questions were raised by James as to the form of the judgment, though this was done by letter rather than a motion to amend. However, because of the provisions of Rule 1, Utah Rules of Civil Procedure, the objections made in the letter should be interpreted as

a motion to amend the judgment. The letter and a response to it by the City were filed within the time required by Rule 59 for amendment of a judgment (R.983).

Thereafter, the City submitted to the trial judge proposed findings of fact and conclusions of law and a new order of partial summary judgment, which were signed and entered on June 1, 1988. The City argues that the time to appeal ran from the date of certification under Rule 54(b), that the notice of appeal filed on June 21, was too late, and that this court, therefore, has no jurisdiction to decide this appeal. It is the position of the City that what it calls the "duplicative order" of June 1, 1988, had no effect upon the running of the time for appeal.

The judgment entered on June 1, however, was the last judgment entered in this case and one which amended the judgment of May 4, 1988, at least with respect to the date of the judgment.

None of the cases cited by the City involved a situation in which the final judgment was entered after the certification. At first glance, the Kansas case, Dennis v. Southeastern Kansas Gas Co., 227 Kan. 872, 610 P.2d 627 (1980), seems to support the City's position in that the date of certification commenced the running of the appeal time although a summary judgment was filed three days later; but under Kansas law, a judgment becomes final and appealable upon the filing of a "journal entry," which in

Dennis occurred on the same date as the certification.

Even assuming that the letter sent to the court cannot be treated as a motion to amend, and that the court's entry of the new judgment on June 1, 1988, constituted error because it was entered beyond the ten days for amendment of a judgment as prescribed by Rule 59, the error did not affect the jurisdiction of the Supreme Court or this court.

The 30-day period within which to file an appeal is set by Rule 4, Rules of Utah Supreme Court, but filing the appeal within the time provided by that rule is not a jurisdictional requirement because Rule 1(d), Rules of the Utah Supreme Court, provides:

These rules shall not be construed to extend or limit the jurisdiction of the Supreme Court as established by law.

Article VIII, Sec. 3, Utah Constitution, specifies that the Supreme Court "shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause," and under 78-2-2, Utah Code 1988, the Supreme Court has appellate jurisdiction over "all orders, judgments, and decrees of any court of record over which the court of appeals does not have original appellate jurisdiction."

Moreover, the Utah Supreme Court has already ruled on the question of jurisdiction.

After filing of the appeal, the City filed with the Utah Supreme Court on July 26, 1988, a motion for summary disposition and dismissal of the appeal. Point III of the motion raised exactly the same question that the City is raising now, i.e., that the notice of appeal was not timely because it was not filed within thirty days after certification of the judgment on May 17, 1988.

On August 19, 1988, the Utah Supreme Court issued the following order:

Salt Lake City Corporation's motion for summary disposition and dismissal of appeal is this date denied, and the case is reserved for plenary review.

Inasmuch as this court has jurisdiction, the only argument available to the City is that the court's amendment of the judgment on June 1, 1988, was error. But the City is in no position to claim error because it did not cross-appeal the court's amendment of the judgment. Moreover, if there were error, it was invited by the City's submission of the findings, conclusion and judgment entered on June 1, and invited error may not be relied upon for reversal of a judgment. Pettingill v. Pekins, 2 Utah 2d 266, 272 P.2d 185, 186 (1954); 5 Am. Jur.2d, Appeal and Error, § 713.

CONCLUSION

The issues raised in James's brief are issues that were raised before the trial court, though sometimes in slightly different terms, and are properly before this court for review. The court has jurisdiction to review them, James's appeal having been perfected. The appeal should be disposed of on its merits, and the case remanded to the District Court of Salt Lake County for trial.

Respectfully submitted,

Bryce E. Roe (Signed)

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CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of December 1988, I caused to be mailed, first class, postage prepaid, ~~a~~⁴ true and correct copy^{ies} of the foregoing APPELLANT'S REPLY BRIEF, to:

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