

1988

# James Constructors, Inc. v. Salt Lake City Corporation : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 88-0502

IN THE UTAH COURT OF APPEALS

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JAMES CONSTRUCTORS, INC.	)	
	)	
Plaintiff and Appellant,	)	
v.	)	
	)	
SALT LAKE CITY CORPORATION,	)	Case No. 880502-CA
	)	Priority No. 14(b)
Defendant and Respondent.	)	
-----		
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.	)	

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APPELLANT'S PETITION FOR REHEARING

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

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IN THE UTAH COURT OF APPEALS

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JAMES CONSTRUCTORS, INC.	)	
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a municipal corporation of the	)	
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Nevada Corporation, HOOD	)	
CORPORATION, a California	)	
corporation, and INDUSTRIAL	)	
INDEMNITY COMPANY, a California	)	
corporation,	)	
	)	
Defendants.	)	

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PETITION

James Constructors, Inc., ("James"), plaintiff and appellant, respectfully petitions the court for a rehearing on the ground that the court overlooked dispositive issues of law and fact raised in the trial court and in the appellant's brief to this court. Those issues are:

(1) Whether there was a total breach of the contract by Salt Lake City Corporation ("the city") when it terminated the right of James to continue performance.

(2) If there was a total breach, whether contractual provisions relating to delays, repairs, extras, and the like preclude recovery of damages by James.

### ARGUMENT

#### I.

#### If Salt Lake City was Guilty of a Total Breach of the Construction Contract, Contractual Limitations on Damages Do Not Control.

In its opinion, the court assumed that the contract provisions relating to delays, repairs and extra costs applied even though Salt Lake City was guilty of a total breach of its contract.

On page 2 of its opinion, the court stated as follows:

In its complaint, Contractor alleged that City had wrongfully terminated the parties' contract and that, as a result, Contractor had suffered the following damages: (a) \$427,601.23 for delays, construction sequence changes, and standby time costs; (b) \$92,698.97 for repairs to the project, including repairs associated with settlement and sinkholes in the trench, and other items; and (c) \$6,542.88 for demobilization costs. The district court held that such claims were precluded under the clear language of the parties' contract. We agree.

In that paragraph the court is saying that even if there is a total breach of a contract, the wronged party is nevertheless still bound by contractual provisions relating to

methods of making claims, responsibility for repairs, and the like. That is not the law.

Major portions of both briefs to this court were devoted to the issue of whether there was a breach of contract by Salt Lake City or by James. James's argument was that if there was a breach by the city and it was a total breach, as that term is used in contract law, James would be entitled to recover either its reliance damages or the reasonable value of the labor and materials furnished for the project without regard to specific contract provisions relating to extras, delays, change orders, and the like. But, this court's opinion treated the matter as if it made no difference whether there was a total breach by Salt Lake City.

The Utah Supreme Court has recognized that where there is a total breach of contract, the nonbreaching party may recover the reasonable value of the services performed.

Wagstaff v. Remco, Inc., 540 P.2d 931, 933 (Utah 1975), was an action by subcontractor against a contractor for additional compensation after the subcontractor had pulled off the job because of a long delay in making an installment payment to him.

In holding that the subcontractor had a right to recover, the court said:

\* \* \* \* We think the principle is correct that where the failure to pay an installment as provided in a construction contract is such a substantial breach that it materially impairs the contractor's ability to perform, he has the right to consider the contract at an end, to cease work, and to recover the value of the work already performed.

Darrell J. Didericksen & Sons v. Magna Water and Sewer Improvement District, 613 P.2d 1116, 1119 (Utah 1980), again involved a construction project in which it was found that the contractor had justifiably ceased work on the project because of the failure of the owner to perform. With respect to damages, the court said:

On the matter of assessing damages the evidence was deficient as to the cost of completion and therefore the court could not apply the formula of assessing damages on the total contract price less the cost of completion. Under such circumstances, the court was justified in determining the damages on the basis of the contract price, or on the reasonable value, of the portion of the project already completed and not paid for.

If the court or jury were to find that Salt Lake City had the duty of selecting suitable bedding and backfill material and determining whether compaction requirements were met, which they could do under the facts of this case, the city's failure to



perform those duties would be a substantial breach of the contract, and its terminating of James's right to proceed would be a repudiation of any further duties of the city under the contract. Such a repudiation gives James a choice of remedy. As pointed out in 5 Corbin on Contracts, § 1104:

As has been stated heretofore, a breach of contract may consist in a repudiation of a contractual duty or in some failure to perform as required. In the case of a repudiation there is no doubt that the injured party has a choice of remedies: (1) an action for damages measured by the amount of his injury in not receiving what he was promised; and (2) restitution of such values he may have already conferred upon the repudiator. \* \* \*

See also, Restatement, Second, Contracts, § 243(2):

Except as stated in Subsection (3) [not applicable here], a breach by non-performance accompanied or followed by repudiation gives rise to a claim for damages for total breach.

And Restatement, Second, Contracts, § 373:

(1) Subject to the rule stated in Subsection (2), on a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

(2) The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for the performance.

The problem is dealt with also in 2 Stein, Construction Law, ¶ 11.02[b]:

Where the contractor has partially completed or performed his work at the time of the owner's breach, he is entitled to recover damages. Several formulas have been recognized by the courts to determine the contractor's expectancy, and, therefore, the appropriate amount of those damages. \* \* \*

The options set out are the contract price less the contractor's cost to complete performance; the cost of the work actually performed to the date of the breach (the contractor's expenditure) plus the contractor's anticipated profit less any progress payments made by the owner to the contractor; and that proportion of the contract price which is represented by the work actually performed by the contractor plus the proportion of profit which would have been recovered had the contractor been allowed to perform.

The author notes in a footnote to the paragraph that "Where full performance by the contractor would have resulted in a loss, the contractor should rescind the contract and sue in quantum meruit for recovery." As Professor Corbin points out, however, it is not necessary to "rescind" the contract in order to recover in quantum meruit.

## II.

### The Right to Recover the Value of the Labor and Materials Furnished Was Raised Both in the Pleadings and in James's Brief to the Trial Court.

This court in its opinion properly noted that James in its complaint had alleged that the city had wrongfully terminated the parties' contract, which is another way of saying that the city had repudiated the contract; and it raised the question as to the types of damages to which James was entitled.

Paragraph 21 of the complaint states:

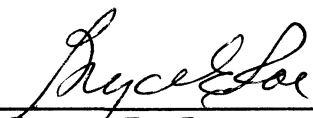
Thereafter, by letter dated April 16, 1984, a copy of which is attached as Exhibit "E" and made a part hereof, defendant terminated plaintiff's contract. The termination by defendant was unjustified and wrongfully done.

In a brief submitted to the trial court, the issue of right to compensation in quantum meruit was raised. At R.666 it is stated that James was entitled to a rescission of its contract and to compensation in quantum meruit for services performed; at R.668, it is stated that James was entitled to payment for extra work claims alleged in its complaint under a theory of quantum meruit; and at R.669 it is pointed out in the argument that the city's action constituted a repudiation or total breach of the contract with James.

### CONCLUSION

This court in its opinion did not consider the question of whether the city totally breached the contract, assuming without deciding that James was bound by contractual provisions with respect to extras, delays, change orders, and the like, whether or not there was a total breach. The cases show, however, that contractual conditions with respect to extra work, changes, and the like become irrelevant where there has been a total breach of the contract by an owner. The contractor, as a result of such a total breach, is entitled to recover the reasonable value of his labor and materials on a quantum meruit basis, or the losses incurred in reliance on the contract. Because this matter was not dealt with by the court in its opinion, it must have been overlooked, and a rehearing should be granted. If believed necessary by the court, the matter can be rebriefed and reargued.


DATED this 2<sup>ND</sup> day of February 1990.

  
\_\_\_\_\_  
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Attorneys for Plaintiff and  
Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 2<sup>ND</sup> day of February 1990, I caused to be mailed, postage prepaid, four (4) true and correct copies of the foregoing APPELLANT'S PETITION FOR REHEARING, to:

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