1978

Breitling Brothers Construction Inc. v. Utah Golden Spikers, Inc. and the State of Utah : Brief of Defendant-Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

BREITLING BROTHERS CONSTRUCTION INC. Plaintiff and Respondent vs. UTAH GOLDEN SPIKERS, INC. and THE STATE OF UTAH Defendants and Appellant	)	Case No. 15945

BRIEF OF DEFENDANT-APPELLANT STATE OF UTAH

Appeal from the Judgment of the Third Judicial
District Court for Salt Lake Co.
Honorable Bryant H. Croft

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IN THE SUPREME COURT
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BREITLING BROTHERS CONSTRUCTION INC.	)	
	)	
Plaintiff-Respondent	)	
	)	
vs.	)	Case No. 15945
	)	
UTAH GOLDEN SPIKERS, INC. and THE STATE OF UTAH	)	
	)	
	)	
Defendants-Appellant	)	

BRIEF OF DEFENDANT-APPELLANT STATE OF UTAH

NATURE OF THE CASE

Plaintiff did work at the Utah State Fairgrounds, not under a contract with the State, but under a contract with the Utah Golden Spikers, for which Plaintiff claims payments from the State of Utah under the Bonding Statute or because of unjust enrichment.

DISPOSITION IN THE LOWER COURT

The lower Court, Bryant H. Croft, District Judge, found the State liable under the provisions of the Bonding Act 14-1-7 UCA Ann. and in quantum meruit because the State was unjustly enriched by Plaintiff's work.

RELIEF SOUGHT ON APPEAL

Appellant, State of Utah, seeks an Order reversing the Order of the Court below and finding Plaintiff has no cause of action against Defendant, State of Utah.

STATEMENT OF FACTS

In March of 1976, the Utah Golden Spikers, possessing a National Soccer League franchise, came to Salt Lake City and began negotiations with Milton L. Weilenmann, Executive Director of the Department of Developmental Services and Hugh C. Bringhurst, Director of the Division of Expositions for leasing of the State Fairgrounds grandstand area for use in playing soccer games in national soccer competition. (R.110,111,139). Although an agreement was prepared and signed by Mr. Weilenmann and Mr. Bringhurst, it was never approved by the Budget Officer or the Director of Finance of the State and was not signed by the Golden Spikers. (Ex. P.1, R.120).

On March 30, 1976, a representative of the Golden Spikers requested Mr. Bringhurst allow the Spikers to proceed with construction of the soccer field, but Mr. Bringhurst said "we can't give you permission." (R.158).

Notwithstanding the lack of an agreement, Weyher Construction Company, apparently at the direction of the Spikers, and without State authority, tore down a fence at

the Fairgrounds and tore up part of the race track in the grandstand area of the Fairgrounds so it could no longer be used as a race track. Mr. Bringhurst stopped the work as soon as he became aware of the destruction, but the usability of the race track was already destroyed. (R.158-161, 164, 165.)

About April 10, 1976, the Plaintiff commenced his work at the Fairgrounds, which included destruction of the balance of the race track, removal of the race track asphalt, delivery of fill material and top soil, preparation of the site for laying turf and equipment rental. (R.128-131, Ex. 3P). There was no contact between the State and Plaintiff or its agents before beginning or while they were doing the work. (R.130). The work was completed about May 10, 1976. (R.132). After completion of Plaintiff's work, the Golden Spikers played several soccer games on the newly installed field and Mr. Bringhurst gave assistance in promoting the games. (R.166,167).

Plaintiff did work in the sum of $11,874.49 for which it billed the Golden Spikers, Inc. (R.130,131). The Spikers lost their National Soccer franchise, became defunct and Plaintiff's bill was not paid by them. (R.108).

Mr. Bringhurst and Mr. Weilenmann allowed construction of the soccer field even though they knew a contract had not been completed. (R.125). At some point in time during construction

the Governor became aware of the construction of the soccer field. (R.125, 126, 191).

Mr. Breitling never saw a contract between the Golden Spikers and the State, never made inquiry from the State officers as to whether or not such a contract existed, did not get permission from the State to do the work and made no inquiry as to why Weyher Construction pulled off the job and until the lawsuit was filed, did not look to the State for payment. (R.132-134).

Destruction of the race track cost the State about $20,000 per year in lost revenue and the State had no maintenance obligations or expenses on the race track. Revenue from the soccer field was insignificant and watering and maintenance costs the State about $1,000 per year. (R.184-187). The net economic difference to the State as a result of the destruction of the race track and the construction of the soccer field is a deficit of about $21,000 per year to the State. The soccer field, as installed, was not safe to play on because it was not properly drained, graded, leveled or sodded. The field must be redone to make it safely usable. (R.156,157,187-187).

ARGUMENT

The issue in this appeal is whether the State can be bound by the unauthorized acts of its employees under an estoppel

theory of unjust enrichment, or whether the State can only be bound in the manner prescribed by the legislature.

I. THE STATE CANNOT BE LIABLE UNDER THE BONDING STATUTE ABSENT A FORMAL CONTRACT.

Section 14-1-5 UCA, under which Plaintiff claims provides in pertinent part, with underlining added for emphasis:

> "Before any contract for the construction...of any... improvement of the State of Utah...is awarded to any person, he shall furnish to the State...bonds which shall become binding upon the award of the contract to such person."

Section 14-1-7 UCA provides:

> "Any public body subject to this act which shall fail or neglect to obtain the delivery of the payment bond as required by this act, shall, upon demand, itself promptly make payment to all persons who have supplied materials or performed labor in the prosecution of the work under the contract, and any such creditor shall have a direct right of action upon his account against such public body in any court having jurisdiction in the county in which the contract was to be performed and executed which action shall be commenced within one year after the furnishing of materials or labor."

No express contract was entered into between the State and the Spikers. Does an implied contract meet the requirements of an "awarded contract." We submit it does not. The very word "award" means to "confer or bestow upon as a result of a decision. To determine or decide after careful consideration." Websters International Unabridged Dictionary, Second Edition. In the case of Jackson v State, 142 NE 1, the Court held "awarded to" meant "entered into with all legal formalities." We submit that is what our legislature meant when it enacted the bonding statute cited above.

The implied contract claimed by Plaintiff cannot bind the State under the Bonding Statute for the further reasons set out in the next point.

Had Plaintiff been careful, he could have made sure a "contract was awarded" the Golden Spikers before he committed his resources.

II. RESTITUTION OR UNJUST ENRICHMENT IS NOT APPROPRIATE IN THIS CASE.

While it is true that Mr. Bringhurst and Mr. Weilenmann carried on extensive negotiations looking toward the execution and award of a contract, the contract was never executed by the Golden Spikers and was never executed by an officer of the State of Utah authorized to enter into such contract.

Section 63-2-1 sets up the Department of Finance to assist the Governor in his duties as Chief Executive Officer and describes the intent of the legislature to be that:

> "The Department shall define budgetary functions relating to the approval and allocation of funds, budgetary control of funds...approval of proposed expenditures for the purchase of supplies and services and prescribing other budgetary functions under the constitutional authority of the State's Chief Executive to transact all executive business for the State..."

63-2-2 sets up the Director of Finance as the State's chief fiscal officer and purchasing agent. Section 63-3-23 provides:

> "The Director of Finance shall exercise the powers and perform the duties relating to the purchase of all supplies, materials, equipment and services required in the administration of any department of the state, the administration of central purchasing and [illegible] system for the departments of the state and the exercise of

inventory control over all departments."

Section 64-1-4 provides:

"Whenever the needs of a state institution require a building to be repaired or erected or any work amounting to more than $1,000 to be done, the governing board of such institution, unless otherwise provided by law, shall advertise for at least 10 days in some newspaper published in the state and having general circulation therein, for sealed proposals for repairing or erecting such building or performing such work, in accordance with plans and specifications to be had at the office of the board; provided, that repairs or construction contemplating an expenditure of $8,000 or more shall be under the direction of the Utah State Building Board."

In a contract for the obtaining of services and supplies as is claimed here, the Director of Finance, only, has the authority to bind the State.

65 AmJur Public Works §153 states very well the law on this subject:

"It is well established that no recovery can be had by a contractor for the construction of a public improvement without compliance with provisions of the law requiring letting of such contracts upon competitive bidding, even though such contract is duly executed and signed and the work has been executed in accordance with its terms. This is true even though the public body has received the benefits of the performance.

These provisions exist to protect citizen taxpayers from unjust, ill-considered or extortionate contracts, or those showing favoritism, and if the public body is suffered to disregard them and the other party permitted to recover upon an implied contract, such provisions can always be evaded and set at naught. To depart from these principles would be to open the door to abuses and practices fraught with danger to the welfare of the citizens and taxpayers of municipalities and political subdivisions of the state."

As was stated by the Court in Tobin v Sundance, 17 P.2d

666:

"These provisions exist to protect citizen taxpayers from unjust, ill considered or extortionate contracts or for those showing favoritism and if the public body is to disregard them and the other party permitted to recover on implied contracts, such provisions can always be evaded and set at naught. To depart from these principles would be to open the door to abuse and practices fraught with the danger to the welfare of citizens and taxpayers of municipalities and political subdivisions of the state."

As was further said in Carolina National Bank v State, 38 SE 629:

"The doctrine of equitable estoppel has no application to a sovereign state...The state can only act under its constitution and through its legislative enactments pursuant thereto, and can only ratify in the manner in which it could originally authorize; and if it could be estopped to assert the truth, the effect might be to fix upon the state responsibilities in conflict with its constitution and laws."

Two interesting cases where services were performed, the benefits were obtained and recovery was denied are as follows: Aetna Insurance Co. v O'Malley, 125 SW 2d 1164; Mullin v State, 446 P.670.

Our Utah Court has spoken collaterally on this subject in one instance only which I was able to locate. In the case of Petty v Borg, 106 Ut.5 524, 150 P.2d 776, the Court held:

"The federal courts have held without exception that the United States...is not bound or estopped by the acts of such officers or agents not within the scope of their authority..."

Absent the strictness governing expenditures by the State, the Plaintiff still does not have an enforceable claim.

Section 110 of the Restatement of Restitution provides:

"A person who has conferred a benefit upon another as the performance of a contract with a third person, it not entitled to restitution from the other merely because of the failure of performance by the third person..."

See also 66 AmJur 2nd, Restitution and Implied Contracts §16 to the same effect.

That is precisely what has happened in this case. The Golden Spikers and Plaintiff entered into a contract for work at the Fair. Plaintiff did work pursuant to the contract with the Spikers. The Spikers did not pay. The State of Utah, the third person, who has had claimed a benefit conferred upon it, was not in any way privy to the contract between the Spikers and the Plaintiff. There was no evidence that it was aware of such a contract. The only showing that was made is that the work was done without State authority but without objection of State officials over a period of nearly a month.

Even if a cause of action for unjust enrichment were made out, there is no evidence that there was a benefit in an economic manner to the State of Utah as a result of the activities of Plaintiff. The State of Utah was receiving substantial revenues from the Race Track operator. It had virtually no expense. With the unauthorized destruction of the race track, the race track revenue terminated. Since that time there has been no revenue generated from the

grandstand or the aborted soccer field. Indeed, there has been a substantial increase in expenditure because of the watering and care required of the turf. The construction of the field was also inadequate for the purpose.

The general rule is that the damages are measured according to the benefit received by the one unjustly enriched not the cost to the performer. 66 AmJur Restitution and Implied Contracts §28, Restatement of Restitution §155.

CONCLUSION

This case presents a difficult balancing of equity for the Court. The Plaintiff has clearly suffered damage because it has expended services and supplied materials for which it has not been paid. This is always painful. A careful contractor would have made sure the Golden Spikers had been awarded a contract by the State. Then he would have been secured under the Bonding Statute. He did not do so. If the Court rules against the Plaintiff, and reverses the Trial Court, the contractor will be out his money. The precedent will be set and contractors will know they must be sure a contract has been properly awarded if they are to recover under the Bonding Statute. They have in their control the ability to avoid this loss.

If this Court upholds the Trial Court, the people of the State of Utah through their duly constituted legislature, will have lost a limitation they intended to impose on all officers and employees of the State with authority to the

expenditure of their funds. With these statutory safeguards having been set aside, a precedent will be set that the deep pocket of the State can be reached through inaction or maybe even collusion of its unauthorized officers. The people of the State do not have in their control a way of safeguarding loss if it cannot be done through the legislature by limiting the manner in which a contract is finalized.

It is submitted in conclusion that a contractor can protect himself adequately against the unfortunate results of loss in a case such as this. The people of the State, however, cannot protect themselves against unauthorized expenditures if the safeguards and limitations established by the legislature are set aside.

The judgment of the Trial Court should therefor be reversed and this action should be dismissed as to the State.

Dated this 3rd day of November, 1978.

Respectfully submitted,

William G. Gibbs
Attorney for Defendant-Appellant
State of Utah

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Brief on Appeal to Mr. Mark McLachlin, 343 So. 4th East, Salt Lake City, Utah 84111, attorney for Plaintiff-Appellee this 3rd day of November, 1978.