

2001

Jaye Smith Construction Co. v. Board of Education, Granite School District : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

DAVE SMITH CONSTRUCTION CO., :
:
Plaintiff-Respondent, :
:
v. :
:
BOARD OF EDUCATION, GRANITE :
SCHOOL DISTRICT, :
:
Defendant-Appellant. :
:

Case No. 14497

BRIEF OF APPELLANT

APPEAL FROM AMENDED JUDGMENT OF THE THIRD
DISTRICT COURT FOR SALT LAKE COUNTY,
HONORABLE STEWART M. HANSON, SR., JUDGE

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FILED

JUN 28 1976

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAYE SMITH CONSTRUCTION CO., :

Plaintiff-Respondent, :

v. :

BOARD OF EDUCATION, GRANITE :
SCHOOL DISTRICT, :

Defendant-Appellant. :

Case No. 14497

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an action by a contractor (Jaye Smith Construction Company) to recover against the contracting authority (Granite School District) for money that the contractor claims is owed it under its contract with Granite School District.

DISPOSITION IN LOWER COURT

On December 19, 1975, the District Court, in a Memorandum Decision (R. 61-62), held that plaintiff was entitled to a judgment against defendant in the amount of \$4,992.24. On January 7, 1976, the District Court, with findings of fact and conclusions of law (R. 63-65), entered

judgment against defendant in the amount of \$4,992.24 plus interest in the amount of \$715.54. (R. 70). On February 20, 1976, the District Court amended the judgment to reduce the amount of interest awarded from \$715.54 to \$599.06 (R. 82-83).

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the District Court's amended judgment reversed and to have judgment entered in appellant's favor.

STATEMENT OF FACTS

On March 6, 1973, at the offices of Granite School District, a bid opening session was conducted to determine the low bidder on a contract to build an addition to the Kearns Junior High School gymnasium (PX*/ 13). The bids, which were submitted in sealed envelopes, were opened by Mr. Davidson, Director of New School Facilities, and handed to Dr. Call. (Tr.**/ 54). In addition to its bid proposal form (PX 10), the envelope of Jaye Smith Construction Company contained a letter signed by Mr. Jaye Smith stating:

*/ As hereinafter used, "PX" means "plaintiff's exhibit" and "DX" means "defendant's exhibit."

**/ As hereinafter used, "Tr." refers to the transcript of testimony.

Due to the difficulty in determining price and availability of the three inch roof deck material specified. . . , I have submitted my proposal on the basis of a cost of 36 cents per square foot of roof area. I use this figure only as a basis for arriving at a total bid price, and stipulate a change in contract price, either higher or lower as the information becomes available. (PX 11).

The evidence is clear that Granite School District officials were not made aware of the contents of this "contingency" letter during the bid opening session. Mr. Davidson testified that the "contingency" letter was not noticed at that time (Tr. 54); Dr. Call, in his affidavit, also claims that the letter was not noticed (R. 48). Mr. Smith, the president of plaintiff, also acknowledges that the contents of the letter were not brought up during the session,* although he claims a passing reference to the existence of the letter was made (Tr. 8). Plaintiff was second lowest bidder, and became low bidder when the previous low bidder asked to be and was allowed to withdraw its bid (Tr. 23-24, PX 13). After the session, when Mr. Smith met with the facilities representatives of Granite, no mention was made of the bid's contingent nature (Tr. 25). Immediately thereafter,

*/ In a letter dated January 14, 1974 (DX 9) from Jaye Smith to Arthur Olsen, the architect assigned to the project, Smith stated that he was "sorry the letter was overlooked at the bid opening."

the Board of Education met and the following occurred:

Dr. Call said that earlier this day, at 5:30 p.m., construction bids were opened for the physical education additions at Kearns Junior High School. The low responsible bidder was Jaye Smith Construction Company, with a bid of \$164,022, and a completion date of August 10, 1973. . . . Dr. Call made a recommendation that the Board award the bid to Jaye Smith Construction Company. (PX 14).

Again, there was no mention whatever of any contingency in the bid made by plaintiff. (Id.).

Two days later on March 8, 1973, Mr. Smith, on behalf of plaintiff, and Granite representatives met and formally signed the contract (PX 12), which provided in paragraph 11:

The Board agrees to pay the contractor for the said work and materials and for the full performance by the contractor of all covenants and conditions in the manner and form set out for the General Contract, including Plans & Specifications the sum of One Hundred Sixty Four Thousand Twenty Two (\$164,022) dollars subject to additions and deductions as herein provided, and subject to the provisions of this Agreement.

Nowhere in the contract is there any mention of a contingency in the amount to be paid the contractor. Moreover, by plaintiff's own admission, no mention whatsoever of a contingent bid was made during the meeting in which Mr. Smith

signed the contract.* / It was not until approximately six weeks later that Mr. Davidson discovered the existence of the letter. This occurred after Mr. Davidson heard about the possible contingency and checked the bid envelope. (Tr. 58).

At trial, counsel for Granite School District objected strenuously to the admission of evidence extraneous to the contract. The evidence was admitted and the court granted Granite a continuing objection to such evidence. (Tr. 2,4).

* / The transcript contains the following interchange between counsel for appellant and Mr. Smith:

Q. On March 8, 1973 was there any discussion at that time with Mr. Davidson as to the contingency in your bid for the roof decking amount?

A. No, there wasn't.

Q. Did you in fact sign the contract on March 8th?

A. Yes.

Q. And did you sign it in the amount of \$164,022.00?

A. I signed the contract with that amount written out.

(Tr.25).

Granite School District personnel have consistently refused to sign any change order allowing plaintiff to receive funds for the wood decking material beyond the amounts provided for in the contract. (Tr. 60). In April of 1974, several months after the job was completed, Mr. Olsen, the architect assigned to the project, signed a change order. Granite School District, the owner, did not sign the change order (PX 20).

ARGUMENT

POINT I

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONSIDERING EVIDENCE ANTECEDENT TO THE CONTRACT WHICH WAS ADMITTED FOR THE PURPOSE OF VARYING OR CONTRADICTING THE WRITTEN CONTRACT.

A. There is No Evidence Indicating that Granite Assented to the Terms of the "Contingency" Letter.

Finding of Fact No. IV of the District Court states:

Court finds that the letter written by the plaintiff was with the bid and it was present at the bid opening. That the same was noticed by agents of the defendant, or should have been, in the exercise of reasonable care in the examination of the bids. (R. 64) (Emphasis added).

Finding No. V states:

Court finds that the qualification letter was part of plaintiff's bid and became part of the contract executed by parties. . . (Id.).

By its terms, Finding IV is not a finding by the court that Granite representatives were aware of the contents of "contingency" letter; on the contrary, the court's conclusion that they should have noticed it clearly indicates an unwillingness by the court to conclude that Granite representatives in fact noticed the letter. Furthermore, by concluding in its memorandum opinion that "before the work was completed they [Granite] did learn of the letter," the court again indicates an unwillingness to conclude that Granite was aware of the letter prior to signing the contract.

The error in the district court's findings is its basing a contractual obligation on the fact that the letter "should have been [noticed] in the exercise of reasonable care." Contractual obligations do not arise out of negligence; rather, a contract can be found only where the parties there- to mutually assent to its terms:

The principle is fundamental that a party cannot be held to have contracted if there is no assent, and this is so both as to express contracts and contracts implied in fact. There must be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract.

17 Am. Jur. 2d, Contracts, §18, at 354 (1964). Thus, the court's absolute failure to find mutual assent to the terms of contingency letter is fatal to the court's finding that the letter "became a part of the contract." This is

especially so in light of the failure of Mr. Smith to bring the contingency up in the meeting following the bid opening and at the time the contract was signed.

B. Even if Granite Representatives were Aware of the Terms of the Contingency Letter any Evidence with Respect Thereto is Barred by the Parol Evidence Rule.

The parol evidence rule has been stated as follows:

When two parties have made a contract and have expressed it in a writing to which both have assented as the complete and accurate integration of the contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.

3 A. Corbin, Corbin on Contracts, §573, at 357 (1960). The parol evidence rule is clearly the law of the State of Utah. Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261, 501 P.2d 266 (1972); Rainford v. Rytting, 22 Utah 2d 252, 451 P.2d 769 (1969); Jensen's Used Cars v. Rice, 7 Utah 2d 376, 323 P.2d 259 (1958); Continental Bank & Trust Co. v. Bybee, 6 Utah 2d 98, 306 P.2d 773 (1957); Farr v. Wasatch Chemical Co., 143 P.2d 281 (Utah 1943). The first essential under the parol evidence rule is that the written contract be integrated. This court, in Bullfrog Marina, Inc. v. Lentz, supra explained the requirements of an integrated contract:

An essential element of an integration is that the parties shall have manifested assent not merely to the provisions of their agreement but to the writing or writings in question as a final statement of their

intentions as to the matters contained therein. Whether a document was or was not adopted as an integration may be proved by any relevant evidence.

501 P.2d at 270. The relevant evidence in this case with regard to this issue is as follows: Granite representatives were not aware of the contingent nature of the bid (the uncontradicted evidence shows that, under its bid policies, had Granite been aware of the contingency, the bid would have been rejected (Tr. 55, 75-76)), and Mr. Smith never mentioned, either after the bid session or when the contract was signed, the contingent bid to Granite officials. Thus, at the time the contract was signed there was nothing to evidence any intent by either party that the written contract was not the full and complete agreement between them. The best evidence of the intent of the parties comes "from the four corners of the instrument itself." Continental Bank & Trust Co. v. Bybee, supra 306 P.2d at 775. As quoted above, paragraph 11 of the contract is clear and unequivocal as to the amount to which the contractor was entitled; nowhere in paragraph 11 or elsewhere in the contract is any contingency mentioned regarding the wood decking materials. There is absolutely no evidence in this case to indicate that the contract signed by the parties was not a fully integrated contract. Whether Mr. Smith subjectively felt that the contingency should be part of the contract, he must be bound by his objective

manifestation of assent to the terms of the written contract.

Once it is determined that a contract is integrated, the following rule of law comes into effect:

[W]hen parties have reduced to writing what appears to be a complete and certain agreement, it will be conclusively presumed, in the absence of fraud, that the writing contains the whole of the agreement between the parties; and that parol evidence of contemporaneous conversations, representations or statements will not be received for the purpose of varying or adding to the terms of the written agreement.

Bullfrog Marina, Inc. v. Lentz, supra, 501 P.2d at 270

(emphasis added). Since the contingency letter was obviously offered to vary the unambiguous terms of paragraph 11 of the contract, the court clearly erred in allowing the admission of such evidence. One of the best statements of the policies behind the parol evidence rule is found in a 1958 opinion of this Court, Jensen's Used Cars v. Rice, supra. In that case, defendant received delivery of a car from plaintiff, paid plaintiff a \$200 check, and signed a conditional sales contract. Later, defendant stopped payment on the check. The next day, however, defendant signed another conditional sales contract containing "clear, complete terms, including the price." Defendant paid nothing on the car, which was subsequently repossessed. Responding to defendant's contentions that the contract was cancelled, that he meant to enter a different contract, and that he didn't execute

the contract, the Court stated:

[H]is testimony was diametrically opposed to the manifestation of mutual assent reflected in his execution of an instrument whose terms were clear, unambiguous, understandable and known.

Elementary it is that in construing contracts we seek to determine the intentions of the parties. But it is also elementary and of extreme practical importance that we hold contracting parties to their clear and understandable language deliberately committed to writing and endorsed by them as signatories thereto. Were this not so business, one with another among our citizens, would be relegated to the chaotic, and the basic purpose of the law to supply enforceable rules of conduct for the maintenance and improvement of an orderly society's welfare and progress would find itself impotent. It is not unreasonable to hold one responsible for language which he himself espouses. Such language is the only implement he gives us to fashion a determination as to the intentions of the parties. Under such circumstances we should not be required to embosom any request that we ignore that very language. This is as it should be. The rule excluding matters outside the four corners of a clear, understandable document, is a fair one, and one's contentions concerning his intent should extend no further than his own clear expressions.

It was urged correctly that to admit matters outside a contract would do violence to the principle that one is bound by his manifestations of assent, and that, irrespective of such contention, such matters properly are excludable by the parol evidence rule,--which rule, counsel suggests, is one of substantive law rather than one of evidence. Whatever kind one calls it, the rule that excludes such evidence is a common sense rule.

323 P.2d at 260-61 (Emphasis added). Similarly in the instant

case, the contract terms were "clear, unambiguous, understandable and known." As such, this Court should again "hold contracting parties to their clear understandable language deliberately committed to writing and endorsed by them as signatories thereto." Appellant submits that prejudicial error was committed by the District Court in admitting the evidence as to the contingent nature of the bid and that the judgment should therefore be reversed.

POINT II

THE CHANGE ORDER SIGNED BY ARTHUR OLSEN IN APRIL 1974 IS NOT BINDING UPON GRANITE SCHOOL DISTRICT.

A. The Change Order is Clearly Invalid Since the Owner Has Never Approved it.

One of plaintiff's claims at trial was that a change order (PX 20) signed by the architect assigned to the project was binding upon Granite School District, thus requiring Granite to pay plaintiff for the extra cost of the wood decking. The District Court did not rule on this issue, either in its Memorandum Decision (R. 61-62) or its Findings of Fact and Conclusions of Law (R. 63-65). Nevertheless, appellant will address this issue on appeal since it is clear as a matter of law that the change order is not binding on Granite School District. The change order presented in evidence by plaintiff (PX 20) contains the following signatory section:

<u>Arthur K. Olsen</u>	<u>Jaye Smith Const., Inc.</u>	<u>Owner</u>
<u>Architect</u>	<u>Contractor</u>	
<u>357 East 5th South</u>	<u>3299 Meadowbrook Drive</u>	<u>Address</u>
<u>Address</u>	<u>Address</u>	
<u>Salt Lake City, Utah</u>	<u>Salt Lake City, Ut 84119</u>	
<u>By /s/ Arthur K. Olsen</u>	<u>By /s/ Jaye B. Smith</u>	<u>By</u>
<u>Date: April 26, 1974</u>	<u>Date: April 25, 1974</u>	<u>Date:</u>

The change order was not and has never been signed by the owner of the property. Thus, on the face of the document it is incomplete. Moreover, the unrebutted evidence of Mr. Davidson and Mr. Hilton, the present Director of Facilities, shows that the practice in Granite School District is that every change order must be approved by the assistant superintendent and signed by a Granite representative as well as the architect (Tr. 50, 76). More importantly, plaintiff's president has admitted that both the architect and owner are involved in determining whether extra funds will be approved:

Q. And that is, of course, in May of 1973. You didn't believe it was a change order expense? You believe it was additional expense to the contract, didn't you?

A. Frankly the architect and owner decide how these different little wrinkles are to be handled.

(Tr. 40) (Emphasis added). Absent the signature of the owner's authorized representative, the change order should be held invalid.

B. Both the Contractor and Architect Were Aware, At the Time of the April 1974 Change Order, That the Architect Was Not Authorized to Bind Granite School District.

As a legal matter, it is clear that the architect was powerless to bind the appellant via the April 1974 change order. The contract in this case outlines specific powers of the architect over various matters yet clearly does not authorize the architect to bind Granite as to change orders. Such situations are governed by the rule that "specific authorization of particular acts tends to show that a more general agency is not intended." Restatement (Second) of Agency § 37(2) (1958).

Moreover, both the architect and contractor were aware of this lack of power, as the exhibits clearly demonstrate. In DX 8, a letter from Olsen, the architect, to Davidson, dated January 8, 1974, Olsen clearly recognizes the need for approval by someone other than himself: "[T]he wood decking is an item that will need to be resolved at a meeting with the appropriate Granite School District representatives." This is further demonstrated by PX 17, a letter from Davidson to Olsen dated January 10, 1974, in which Davidson makes it very clear that the decision whether to pay plaintiff was not one to be made by Olsen. Moreover, it is also clear that Smith was aware that Olsen was not authorized to bind Granite by virtue of fact that Smith had read Davidson's letter to Olsen. In PX 18, a letter from Smith to Olsen, Smith refers to the contents

of Davidson's letter. Smith also stated in testimony that he saw the January 10 letter and was aware that Granite was not going to authorize the payment. (Tr. 36-37). Therefore, because of its knowledge to the contrary, plaintiff cannot claim that it believed that Olsen was authorized to issue the April 1974 change order.

C. The Change Order, Even if Validly Executed, is Unenforceable Since it is Not Supported by Consideration.

As discussed supra, the change order relied upon by plaintiff was executed months subsequent to the completion of the project. Plaintiff had fully performed its obligations with regard to the additions to the junior high gymnasium.

Under the law of contracts, a contract may be superseded or modified by another contract (such as a change order). However, the law is clear that

a new agreement by the parties to an older one, altering, canceling, supplementing, or supplanting their former compact, in order to be valid, requires some consideration. Where a written contract is, by a later contract, altered or modified in some of its terms, the later contract must be founded upon some valid consideration.

17 Am. Jur. 2d Contracts § 460, at 926-27 (1964). What does or does not constitute sufficient consideration is further analyzed in the same treatise:

[I]t is generally held that there is insufficient consideration in the absence of . . . reciprocity of consideration. Each party must gain or lose something by the change. If the benefit or detriment is unilateral, a consideration is lacking, for it

is a well established legal principle that doing or undertaking to do only that which one is already under a legal obligation to do by his contract is no consideration for another's agreement to do what he is not already under a legal obligation to do.

Id. § 461, at 927-28 (emphasis added). In this case, Granite could receive nothing more than it had already received under the contract. Any benefit derived from the change order was necessarily unilateral. Thus, under the legal principles articulated above, the change order was without consideration and therefore unenforceable.

POINT III

THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR IN ALLOWING PLAINTIFF TO AMEND ITS COMPLAINT AFTER TRIAL HAD BEGUN.

At trial, after evidence had been presented, plaintiff sought to amend its complaint to include a claim that defendant had improperly withheld payment from plaintiff for extra costs incurred in striping the basketball floor at Kearns Junior High School. This request was granted over defendant's objection (Tr. 18-19) and the Court ultimately granted judgment for plaintiff on this claim in the amount of \$150. Granite was neither prepared to present evidence on or to defend against plaintiff's allegations regarding this claim. Defendant was prepared regarding the issues raised by plaintiff's complaint--namely, whether Granite was liable for the added costs.

of the decking material. Plaintiff's complaint (R. 1-2), which was filed on September 12, 1974, made no claim whatever on the striping question, nor was any discovery had on this issue. As such, defendant was completely surprised and prejudicially affected by the Court's allowing plaintiff to amend its complaint after trial had begun.

Although it is freely conceded that Rule 15(a) of the Utah Rules of Civil Procedure provides that leave to amend pleadings "shall be freely given when justice so requires," such liberality cannot operate to the prejudice of another party. Indeed, one of the primary purposes of pleading is to prevent surprise at trial. In Porter v. Shoemaker, 6 F.R.D. 438 (M.D. Pa. 1947), for example, the court was construing the purposes of pleading under the Federal Rules (after which the Utah rules are patterned), and had this to say:

The whole theory with respect to the functions of pleading is changed. Under the equity practice the function was to plead facts and to frame the issues. Under the new rules, the purpose of the pleadings is to give notice of what an adverse party may expect to meet. The broadening of the discovery rules and other pretrial procedure is designed to define the issues and obtain the facts."

Id. at 440 (Emphasis added). Thus, unless an adverse party is notified of the claims of the other party, the whole purpose of the Rules of Civil Procedure is subverted.

The case law in the United States is unanimous in its conclusion that the liberal rule regarding amendment of pleadings must be weighed against the possible prejudicial

effect such liberality can have on an opposing party. In Strauss v. Douglas Aircraft Co., 404 F.2d 1152 (2d Cir. 1968), just prior to trial (and four years after the initial answer was filed) the defendant attempted to amend its answer to raise a statute of limitations defense. In holding that the defendant could not be allowed to amend at that late date, the court reasoned:

Fed. R. Civ. P. 15(a) requires that leave to amend the pleadings be granted freely "when justice so requires." At the same time, it is clear that such leave should be denied where the amendment would cause substantial prejudice to a party to the action.

Id. at 1155 (Emphasis added). See also Jackson City Bank & Trust Co. v. Blair, 333 Mich. 399, 53 N.W. 2d 493 (1952), where the court held that "only those amendments should be allowed which do not work to the surprise or disadvantage of the adverse party." Finally, in summarizing the law regarding amendment of pleadings, a well known treatise stated:

The court will ordinarily refuse to grant its permission to amend a pleading where the motion comes too late and in such circumstances that the rights of the adverse party will necessarily be prejudicially affected.

61 Am. Jur. 2d Pleading § 314, at 720 (1972). Because Granite School District was not apprised in any manner prior to trial that claims relating to the basketball striping would be litigated, it is clear that it was surprised at trial and thereby prejudicially affected. A fundamental tenet of our judicial system is that a party be given time to prepare its case; this

was not done with regard to the plaintiff's striping claim. As such, this court should hold that the District Court erred in allowing plaintiff to amend.

CONCLUSION

Bidding procedures by their very nature require that the bidder make a firm statement of the amount for which he is willing to do a particular project. If contingent bids were allowed, it would become difficult, if not impossible to determine who the real low bidder actually is. In the instant case, for example, if plaintiff were awarded the extra \$4,842.25 it claims, its actual bid will be \$168,864.25, or \$1878.25 over the bid of Dean Cannon Construction Company (PX 13). This obviously creates a very unfair situation to bidders in the position of Cannon Construction Company. Furthermore, as Mr. Davidson stated in this regard, "[i]f we allow things like this to crop into our bidding then the question of who was the low bidder just becomes a circus because every contractor has some problems when it comes to bidding a job." (PX17).

Granite School District respectfully urges this Court to reverse the trial court's award of judgment to plaintiff on the following grounds:

(1) The trial court committed prejudicial error in admitting antecedent evidence which was offered for the purpose of varying the terms of an integrated contract between the parties.

(2) The change order signed by Mr. Olsen is,
as a matter of law, not binding on Granite School District.

(3) The trial court committed prejudicial error
in allowing plaintiff to amend its complaint after trial
had commenced.

Respectfully submitted,

FABIAN & CLENDENIN

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CERTIFICATE OF DELIVERY

I hereby certify that a true copy of Brief of
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