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Allen-Rowe Specialties Corp. v. U. S. Construction, Inc. et al : Appellant's Reply Brief

Utah Supreme Court

Peter W. Billings; Warren Patten; Charles B. Casper; Fabian & Clendenin; Attorneys for Appellant; Gordon L. Roberts; Daniel M. Allred; Val R. Antczak; Parsons, Behle & Latimer; Attorneys for Respondents;

IN THE SUPREME COURT OF UTAH

ALLEN-HOWE SPECIALTIES CORP., a Utah corporation,	)	
Plaintiff and Appellant,	)	
v.	)	Case No. 16209
U.S. CONSTRUCTION, INC., a corporation, JACOBS ENGINEERING CO., a corporation, and WYOMING MINERAL CORPORATION, a corporation,	)	
Defendants and Respondents.	)	

APPELLANT'S REPLY BRIEF

Appeal from the Summary Judgment of the
Third District Court for Salt Lake County
The Honorable G. Hal Taylor, Judge

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IN THE SUPREME COURT OF UTAH

ALLEN-HOWE SPECIALTIES CORP., a Utah corporation, Plaintiff and Appellant, v. U.S. CONSTRUCTION, INC., a corporation, JACOBS ENGINEERING CO., a corporation, and WYOMING MINERAL CORPORATION, a corporation, Defendants and Respondents.	)	Case No. 16209

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I. WHETHER PLAINTIFF AND U. S. CONSTRUCTION AGREED TO AN ACCORD AND SATISFACTION IS A GENIUNE ISSUE OF MATERIAL FACT.

Respondents principally rely upon an accord and satisfaction to sustain the summary judgment entered in their favor. (Brief of Respondents at 9-29). An accord and satisfaction cannot exist unless, as with other contracts, both parties assent to it. The Record now before this Court plainly reveals that whether there was ever a "meeting of the minds" between plaintiff and U. S. Construction is a genuine issue of material fact. The Record contains the following evidence raising this question of fact (Record citations appear in Brief of Appellant 27-32):

(1) On two separate occasions, more than a month apart, plaintiff's president, William C. Howe, Jr., refused to sign lien waivers tendered to him by U.S. Construction until they were changed

to reflect a partial rather than full waiver. When Mr. Howe arrived at U. S. Construction's office to pick up plaintiff's check, a U. S. Construction employee, Patricia Platts, who was herself authorized to sign checks, presented him with a check and a separate lien waiver form. Mr. Howe was supposed to sign the lien waiver in order to receive the check. He refused to release all of plaintiff's claims for additional compensation in exchange for the check. Mr. Howe then changed the lien waiver to reflect only a partial, rather than a full, waiver. Ms. Platts accepted the lien waiver as altered, made a xerox copy of it for Mr. Howe, and then released the corresponding check to him.

The checks Mr. Howe received contain standard printed lien-waiver language on the back. In this case, in which U. S. Construction used separate lien waivers, the standard form language on the back of the checks was redundant. Recognizing the redundancy, Mr. Howe, with the permission of an officer of U. S. Construction's bank, made the same change on the checks that he had made on the lien waiver -- that is, changing "full" to "partial." This procedure was followed in August and again in September.

In their brief, Respondents claim that because they are relying upon the standard form language printed on the back of U. S. Construction's checks rather than the separate lien waivers, the fact that Mr. Howe refused to sign the lien waiver forms and communicated that refusal to Ms. Platts, a U. S. Construction employee, is irrelevant. Respondents ignore the obvious fact that the lien waiver forms and checks contain parallel language and that

Mr. Howe, plaintiff's president, refused to agree to a full lien waiver, and communicated that refusal to U. S. Construction.

(2) Plaintiff's president changed the standard form language on U. S. Construction's checks to reflect only a partial lien waiver three times, each time about a month after the last. U. S. Construction should have been aware from its cancelled checks alone that plaintiff refused to assent to an accord and satisfaction, yet continued to release checks to him.

(3) While U. S. Construction was issuing checks to plaintiff that supposedly constituted an accord and satisfaction, plaintiff and U. S. Construction were negotiating over plaintiff's claims for additional compensation. Plaintiff sent U. S. Construction invoices and proposals for extra compensation, and attended meetings with U. S. Construction representatives to discuss them. For example, plaintiff, representatives of U. S. Construction and representatives of Jacobs Engineering (the project engineer) met on August 22, 1977 to discuss plaintiff's claim for additional compensation; some of the claims related back to the beginning of the job, well before plaintiff endorsed some of the checks that Respondents contend amount to an accord and satisfaction. (R. 237, ex. D-9; ex. D-10; ex. D-12; ex. D-34; ex. D-35).

On August 18, 1977, plaintiff's president and U. S. Construction's president had previously met to review plaintiff's claim in preparation for the August 22 meeting. (R. 238 at 117-123). On September 28, 1977, U. S. Construction approved for payment a claim made by plaintiff for interference from a crane that

occurred on July 20, 1977. (R. 237, ex. D-27). One of the checks that plaintiff endorsed intervened in time, but was obviously not regarded as barring plaintiff's claim.

These facts demonstrate a course of dealing between plaintiff and U. S. Construction that raises at least a question of fact about whether the standard form language on U. S. Construction's checks was intended by either plaintiff or U. S. Construction to create an accord and satisfaction barring plaintiff's claims for additional compensation.

Two decisions published after Appellant's original brief was prepared demonstrate that a summary judgment should not have been granted on the basis of an accord and satisfaction. In KOVO v. McCrimmon, No. 15735 (Utah, 1/23/79), an advertiser sent KOVO radio a check with a restrictive endorsement indicating that it was tendered in full satisfaction of his account. A KOVO representative scratched out the endorsement, called the advertiser to tell him that the check was being accepted as partial payment only, and that he could stop payment on it if he insisted on the condition. KOVO thereafter cashed the check. The trial court found as a fact that there was no accord and satisfaction. This court affirmed, stating:

> Such conclusion [that an accord and satisfaction was not established] amply is supported by KOVO's refusal to accept the endorsement, and the failure by [the advertiser] to stop payment simply emphasizes such conclusion.

The present case is similar. Plaintiff's president told U.S. Construction that he would not waive his lien rights, and was nevertheless given not one but three checks over a period of three months. Had U.S. Construction actually intended to tender checks

only upon such a condition, it could have refused to give the checks to plaintiff or stopped payment on them upon learning that plaintiff would not agree to the condition. It did neither.

In Fritz v. Marantette, 404 Mich. 329, 273 N.W.2d 425 (1978), a buyer and seller of corn fell into a dispute over whether $15,282.21 or $24,000 was due the buyer. The buyer sent a check for the lesser sum (which he admitted he owed) and placed a restrictive endorsement on the back reciting full payment. After some conversations with the buyer, the seller crossed out the restrictive endorsement and cashed the check. The Michigan court affirmed the trial court's finding that no accord and satisfaction had been reached:

> . . . [I]t is clear that whether a particular set of facts amounts to an accord and satisfaction is generally a question of fact for the fact finder. One of the key elements, which the trier of fact must find to reach the conclusion that an accord and satisfaction exists, is a "meeting of the minds."
>
> In the instant case, plaintiff's conduct and the testimony of the parties presents a question of fact as to whether the negotiation of the conditioned check constituted an accord and satisfaction.

Id. at 273 N.W.2d 427 (emphasis supplied).

The same question of fact -- whether there was a meeting of the minds with respect to an accord and satisfaction -- is apparent in the Record now before this Court. For the same reason that the Michigan court refused to overrule the trial court's finding on this factual issue, this Court should reverse the summary judgment that refused even to recognize the existence of a factual issue.

As an alternative ground, the Michigan court held that the alleged accord and satisfaction lacked consideration:

> Alternatively, the jury could find that the amount paid represented the undisputed portion of the corn contract. The facts indicate that the so-called "dispute" concerned only the amount to be deducted for damages assertedly suffered because of the delivery of inferior corn. The defendant deducted the full amount of the asserted damages and thus the amount deducted does not represent any compromise or settlement. The defendant "merely paid what both sides acknowledged was due." See Gitre, supra, 624, 198 N.W.2d 405, to support the proposition that payment of the undisputed portion of a contract will not support an accord and satisfaction discharging the balance.

Id. at 427 N.W.2d 428 (emphasis supplied).

The facts upon which the Michigan based its finding of no consideration are identical to those of the present case. One party to a single contract claimed he owed one amount; the other claimed that more was due. The contract was, therefore, unliquidated. The debtor paid only what he admitted was due. The Michigan Supreme Court ruled exactly as plaintiff urges this Court to rule -- that payment of only the part of a debt that the debtor admits he owes is not consideration for an accord and satisfaction.

Apart from the consideration issue, whether plaintiff and U. S. Construction even had a meeting of the minds with respect to an accord and satisfaction is subject to grave dispute on the facts in the Record. The summary judgment denying plaintiff the opportunity to have a trier of fact resolve the question was a serious injustice.

II. PLAINTIFF MAY RECOVER ADDITIONAL COMPENSATION IN QUASI-CONTRACT.

Respondents, at pages 32-34 of their brief, erroneously assert that because plaintiff has a subcontract with U. S. Construction, plaintiff may not recover in quasi-contract, either

quantum meruit or for unjust enrichment. Respondents cite Jaye Smith Const. v. Bd. of Ed., Granite School Dist., 560 P.2d 320 (Utah 1977) as authority.

Jaye Smith is not at all relevant to plaintiff's quasi-contractual claims. In Jaye Smith, a contractor who submitted a bid on a school building was unsure of the price or availability of the type of roofing material called for, and therefore enclosed a note with his bid reserving the right to raise or lower it depending upon the actual price of the material.

When the formal contract was signed following the school district's acceptance of the contractor's bid, the contractor failed to include the contingency in the contract. The school district contended that it did not have any knowledge of the contingency until four to six weeks after the contract was signed. When the contractor finally acquired the roofing material, it proved to be about $3,000 more expensive than he had anticipated.

The contractor was not allowed to pass the additional expense on to the school district. The contractor was aware of the uncertain price of the roofing material before the contract was entered into, and, despite that awareness, signed a fixed-price contract with no provision for any increase. Jaye Smith did not involve any substantial change in the nature or scope of work done; it merely involved a $3,000 increase in the cost of roofing material.

In the present case, the nature and extent of the work done by plaintiff proved to be vastly different than called for under the subcontract. There were numerous changes in the project plans and

specifications; the concrete foundation that had to be in place before plaintiff could begin work was weeks late; the structural steel was not delivered directly to the job site as had been promised, but was stacked so far away that plaintiff was forced to employ an otherwise unnecessary crane to load the steel onto a truck, transport it to the job site and, again with a crane, remove it from the truck; identifying markings on the steel were sandblasted away and steel threads were painted over. Moreover, in order to prevent the start-up delay from delaying the project, the project engineer scheduled large amounts of simultaneous work by many crafts, depriving plaintiff of the opportunity to work without interference. (Record citations in Brief of Appellant at 3-4).

In an affidavit, which must be considered as true in summary judgment proceedings, plaintiff's president testified that these factors "substantially changed the nature and scope of plaintiff's work from that disclosed in [the] drawings and specifications. . ." (R. 166-167 at ¶3). This testimony, together with the very magnitude of plaintiff's claim, reveals that the subcontract was, in essence, abandoned and plaintiff was required to do substantially different work than that contemplated in the subcontract. Jaye Smith, the case on which respondents rely, involved merely a price increase in roofing material, not a substantial change in the scope or magnitude of the work.

It has long been the rule in Utah that when the work a contractor actually performs turns out to be substantially different than it appeared at the bidding stage, the contractor may recover

quasi-contract for the extra work. It is original brief, plaintiff cited Wunderlich Contracting Co. v. United States, 240 F.2d 201 (10th Cir. 1957) and Salt Lake City v. Smith, 104 F. 457 (8th Cir. 1900), both applying Utah law, as authority for this rule. See also Thorn Construction Co., Inc. v. Utah Department of Transportation, 598 P.2d 365 (Utah 1979); Richards Contracting Co. v. Fullmer Brothers, 18 Utah 2d 177, 417 P.2d 755 (1966). Respondents did not even mention these cases in their brief. Respondents' only attempt to refute plaintiff's claim for quasi-contractual recovery was to say that quasi-contractual recovery is improper where there is a written contract.

Respondents' refutation is obviously insufficient. There were written contracts involved in both Wunderlich and Smith. Quasi-contractual recovery was nevertheless allowed because the extra work performed was beyond the scope of the written contracts, just as plaintiff's work was beyond the scope of its written subcontract.

If the work plaintiff actually performed was substantially different or more extensive than appeared when the subcontract was executed, plaintiff is entitled to recover in quasi-contract. Because such recovery is in quasi-contract, the provisions of the abandoned subcontract have no application.

Whether the work plaintiff did was substantially different from that contemplated by the subcontract is, of course, a question of fact raised in an affidavit filed in this action. A summary

judgment against plaintiff based on the contractual defenses is, therefore, manifestly improper. As this Court has observed:

> A contract with specific terms cannot remain hypertechnically specific after the parties decide on extras, which was the case here, in which event another contract in quasi-contract arises based on a so-called quantum meruit. . .

Richards Contracting Co. v. Fullmer Brothers, 18 Utah 2d 177, 417 P.2d 755 (1966).

III. THE SUBCONTRACT DOES NOT BAR PLAINTIFF'S CLAIM FOR ADDITIONAL COMPENSATION.

A. Plaintiff Complied With the Subcontract.

Even if this Court could ignore the affidavit of plaintiff's president (R. 166-167) and hold that plaintiff may not recover in quasi-contract, plaintiff's claims still would not be barred by the provisions of the subcontract itself. Respondents correctly point out, at pages 30-31 of their brief, that the subcontract provisions purport to require plaintiff to give written notice of claims for extra work, delay and interference no later than five days after the date of the occurrence giving rise to the claim.

Respondents then erroneously argue that plaintiff failed t submit its claims within five days of the relevant occurrences. When making that assertion, Respondents ignored a written proposal dated August 8, 1977 that plaintiff sent to U. S. Construction, whe plaintiff's work was, perhaps, only half complete. (The Record doe not reveal the exact percentage of completion as of that date.) That proposal (R. 237, ex. D-12) requested that the subcontract be amended to grant plaintiff an additional $55,065.75, $35,173.00 of

which was the estimated expense of additional work to be done in the future.

The proposal recites that it is a claim for additional compensation for the following reasons:

> Interference of structures, process equipment, piping, mechanical, electrical work, materials and workmen with safe and orderly erection of structural steel, liner panel, and exterior panels.
>
> Initial delays having to do with concrete pours, material deliveries, improper base plates, lack of marks on steel, lack of shims, mud and inadequate backfilling, delays in steel deliveries and painting, and fabricating errors & corrections have compounded the problem of interferences, because other crafts and trades have had to proceed with their work to meet project requirements.

This proposal constitutes an advance written claim for additional compensation for all work done after August 8, 1977. With respect to work done after that date, plaintiff complied with the letter of the contract by requesting advance approval for the work.

B. U. S. Construction Waived the Subcontract's Written-Notice-of-Claims Provision.

It is well-established that contractual provisions in construction contracts requiring written notice of claims for additional compensation to be made either before the work is done or within a short term thereafter may be waived. Rivercliff Co. v. Linebarger, 223 Ark. 105, 264 S.W.2d 842, cert. denied, 348 U. S. 834 (1954) (waiver by subsequent conduct in paying claims for which written approval had not been obtained); Vitra-Spray of Florida, Inc. v. Gumenick, 144 So.2d 533 (Fla. App. 1962) (same); Annot., 2 A.L.R.3d 620 §§19-27 (1965).

The Record now before this Court contains evidence of such a waiver. On July 20, 1977, a crane operated by the project's engineering firm, Defendant Jacob's Engineering, interfered with plaintiff's crane, causing plaintiff considerable additional labor costs. Plaintiff's first written claim for this interference was on August 25, 1977, substantially more than five days after the occurrence. (R. 237, ex. D-18, D-35, D-36). Despite plaintiff's noncompliance with the five-day notice provision, U.S. Construction paid for the interference. (R. 237, ex. D-25).

Moreover, representatives of U. S. construction and Jacobs Engineering, at a meeting held on August 22, 1979 for the purpose of reviewing plaintiff's claims, encouraged plaintiff to prepare documentation of the claims, some of which dated back to the beginning of the project, for consideration on the merits. (R. 237, ex. D-18). Four days prior to this meeting, plaintiff's president had met with U. S. Construction's president for the purpose of reviewing and revising the claim that plaintiff was planning to present on August 22. (R. 238 at 71-80).

There is no suggestion in the Record that at either of these meetings any representative of U. S. Construction or Jacobs Engineering told plaintiff that its claims would not be considered because of noncompliance with the five-day notice provision. On the contrary, plaintiff was told to submit the claim and supporting documentation for consideration on the merits. Plaintiff did so and the claims were ultimately denied on the merits, without even an allusion to the five-day provision. (R. 237, ex. D-27).

With this evidence in the Record that Respondents waived the five-day notice provision of the subcontract, plaintiff's failure to comply with that provision for the period prior to August 8, 1977 is no basis for sustaining the summary judgment entered below. As noted above, plaintiff gave advance notice of its claims arising after August 8, 1977, and therefore complied with the five-day provision with respect to the claims that occurred after that date.

IV. SUMMARY JUDGMENT WAS IMPROPER ON PLAINTIFF'S OTHER CLAIMS.

Plaintiff has asserted three causes of action against Wyoming Mineral (the lessee of the real property) and two against Jacobs Engineering. These claims were not argued to the district court, and Respondents devoted only five pages of the brief to them. All depend upon the disputed issues of material fact previously discussed.

A. Foreclosure of Mechanic's Lien.

Plaintiff seeks to foreclose its properly perfected mechanic's lien upon Wyoming Mineral's leasehold interest in the land. Respondents contend that plaintiff's lien is limited by the subcontract price and, in support, cite Sierra Nevada Lumber Co. v. Whitmore, 24 Utah 131, 138, 66 P. 779 (1901). In Whitmore, the subcontractor's work was within the scope of its subcontract. In the present case, however, there are facts in the Record showing that plaintiff's subcontract was abandoned by the substantial change in the nature and scope of plaintiff's work. It makes no sense to continue the mechanic's lien statute, which gives plaintiff a lien for the "value of the service rendered, labor performed or materials

furnished," Utah Code Ann. § 38-1-3 (1953), as limiting the lien to the price of an abandoned subcontract.

Because of the facts in the Record that reveal abandonment of the subcontract and would, if proved at trial, allow plaintiff to recover in quasi-contract, the present case is unripe for a determination of plaintiff's mechanic's lien rights at this time.

B. Interference with Plaintiff's Work.

Respondents assert, at pages 35-36 of their brief, that Count V of plaintiff's complaint for Wyoming Mineral's and its agent Jacobs Engineering's interference with plaintiff's work should have been dismissed below because plaintiff had no contract with Wyoming Mineral or Jacobs Engineering.

There are facts in the Record establishing that Jacobs Engineering, the on-site project engineer, interfered with plaintiff's work by scheduling simultaneous work by numerous crafts causing plaintiff unexpectedly high labor costs. (R. 240 at 84-84). Because Wyoming Mineral assigned all of its rights and duties under its general contract with U. S. Construction to Jacobs Engineering, including the right to coordinate the work, Jacobs acted as Wyoming's agent, and Wyoming is therefore liable for Jacobs' interference to the same extent as Jacobs itself. (R. 240, ex. P-61).

It is now widely recognized that one who intentionally commits acts that interfere with another's performance of a contra becomes liable for the interference, unless the acts are privileg

> We may generalize that any intended and unprivileged interference which causes loss to either party to a transacti

> is actionable by the party suffering the loss. . . . Thus, any conduct which is intended to and which, in fact, makes performance more onerous is, unless privileged, a tort against the promisor.

Harper, "Interference with Contractual Relations," 47 Nw. L.Rev. 873, 883 (1953). Accord, W. Prosser, Law of Torts § 129 (4th ed. 1971). The quoted language from Professor Harper's article was expressly approved in Goodall v. Columbia Ventures, Inc., 374 F.Supp. 1324, 1332 (S.D.N.Y. 1974).

This Court has approved this cause of action:

> In order to establish a right to recover on such a cause of action the plaintiffs would have to show that the defendants, without justification, by some wrongful and malicious act, interfered with the plaintiff's right of contract, and that actual damage resulted.

Soter v. Wasatch Development Corp., 21 Utah 2d 224, 443 P.2d 663 (1968). Other cases make it clear that the "wrongful and malicious" act mentioned in Soter need not be done with actual malice or ill will:

> "Malice" is an element of the tort only to the extent that "the intentional doing of a wrongful act without legal or social justification" is malicious; "malice" in this context does not require "actual malice or ill will."

Aljassim v. SS South Star, 323 F.Supp. 918, 924 (S.D.N.Y. 1971), quoting from Campbell v. Gates, 236 N.Y. 457, 460, 141 N.E. 914, 915 (1923).

Professor Prosser agrees that, in this context, malice simply means the intentional doing of an act known to interfere with another's contract:

> The early cases, with their emphasis upon "malice," regarded proof of an improper motive as an essential part of the plaintiff's cause of action. As the tort became more firmly established, there was a gradual shift of emphasis, until today

> it is generally agreed that an intentional interference with the existing contractual relations of another is prima facie sufficient for liability, and that the burden of proving that it is "justified" rests upon the defendant.

W. Prosser, Law of Torts § 129 at 942 (4th ed. 1971). Jacobs Engineering's intentional choice to cause interference with plaintiff's work by scheduling a large volume of simultaneous work in order to bring the project back on schedule is sufficient "malice" for purposes of this tort.

Plaintiff may recover for the interference caused by Jacobs Engineering on another theory as well. Jacobs Engineering, just as other professionals such as doctors, accountants and lawyers, owed a duty to perform its engineering function with reasonable care. United States for the Use of Los Angeles Testing Laboratory v. Rogers & Rogers, 161 F.Supp. 132 (S.D. Cal. 1958).

It is clear that privity of contract is not a bar to recovery for breach of this duty, but extends to all persons who may forseeably be injured by the engineer's breach. Millner v. Elmer Fox & Co., 529 P.2d 806 (Utah 1974) (accountant); Rogers & Rogers, supra (architect). In Rogers & Rogers, supra, an architect was in charge of supervising a construction project. The prime contractor, who was not in privity with the architect, suffered damages as a result of the architect's failure to perform its supervisory duties with due care. The architect's motion for summary judgment on the ground, inter alia, that it was not in privity with the injured contractor was denied.

The Record thus presents genuine issues of material fact with respect to plaintiff's claims against Jacobs Engineering and

Wyoming Mineral: Jacobs Engineering, supervising the project as assignee of Wyoming Mineral's contract with U. S. Construction, caused well-documented interference to plaintiff. (R. 237, ex. D-34). Indeed, there are facts in the Record to show that Jacobs Engineering intentionally chose to cause plaintiff extra interference and expense in order to make up lost time in the schedule. (R. 240 at 84-85). These factual issues of whether there was interference, and, if so its cause and effect, preclude summary judgment on plaintiff's claims against Jacobs Engineering and Wyoming Mineral.

CONCLUSION

Plaintiff has shown that important genuine issues of material fact are present in each of plaintiff's claims. This Court should remand all of plaintiff's claims to the district court for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 1979, I delivered two true and correct copies of the foregoing Appellant's Reply Brief to Gordon L. Roberts, Daniel M. Allred and Val R. Antczak of Parsons, Behle and Latimer, 79 South State Street, Salt Lake City, Utah 84111, Attorneys for Respondents.

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