1980

Allen-Rowe Specialties Corp. v. U. S. Construction, Inc. et al : Brief in Answer to Petition for Rehearing

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.	)	

BRIEF IN ANSWER TO PETITION FOR REHEARING

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

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INTRODUCTION

Plaintiff/Appellant Allen-Howe Specialties Corp.'s ("Appellant") Petition for Rehearing is improper because 1) the arguments are improperly raised at this late date; 2) the arguments were not overlooked in this Court's Opinion of April 21, 1980; and, 3) Appellant's arguments fail on their merits. Each of these points will be treated below.

FACTS

Appellant's Facts are essentially correct, except in its failure to note that the arguments now made by Appellant were raised for the first time in its Reply Brief on appeal. Further, Appellant too narrowly construes this Court's Opinion of April 21, 1980 as relying only on the five day notice provision, instead of both non-compliance with the five day notice provision and the presence of a no damage for delay clause.

I.

ISSUES ARE NOT PROPERLY BEFORE THE COURT.

The Appellant has lost its opportunity to have these issues considered by this Court. The Appellant originally filed this Action in the Third Judicial District Court of Salt Lake County, State of Utah, on December 15, 1977. In connection with its clai for additional compensation, Appellant alleged in its Count II as follows:

> 14. Pursuant to its contract with U.S. Construction, Inc., together with extras, plaintiff performed labor and furnished materials in the amount of $128,302.42 of which amount U.S. Construction, Inc. has paid $53,292.00, leaving a balance due of $75,010.42. (R4)

As is apparent from its Petition for Rehearing, Appellant now seeks compensation not for "extras", as alleged in its Complaint, but rather for interference. In addition, at no point in its original complaint did Appellant allege that any provision of the contract had been waived by U.S. Construction or any agent of U.S. Construction.

The Defendants moved for a Summary Judgment in the Fall of 1978. At that time, Defendants fully set forth their argument concerning Plaintiff being barred from any relief by contract provisions. (R.102 - 104). In its Memorandum in Opposition to Defendants' Motion for Summary Judgment, Appellant did not, in any form, raise the arguments it now raises in its Petition for Rehearing. (See Memorandum in Opposition to Defendants' Motion for Summary Judgment, R.146 - 165).

Neither did Appellant raise these issues in its "Brief of Appellant" filed with this Court on appeal.

The arguments were first raised by the Appellants in its Reply Brief, at a time when Defendants had neither an opportunity to object to the issues being suddenly raised, nor an opportunity to respond to those arguments.

Since this waiver argument was neither pled nor argued at the trial level below, the Supreme Court need not now consider the argument. As this Court held in Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 704, 705 (1971):

> Matters neither raised in the pleadings nor put in issue at the trial cannot be considered for the first time on appeal.
>
> In Simpson v. General Motors Corporation this court held that a party may not inject a new doctrine upon which to predicate liability for the first time on appeal. This court stated:
>
> . . . Orderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round of litigation.

Appellants improperly raised these arguments for the first time in its Reply Brief. Appellants now seek to obtain a rehearing based on issues which were not properly before this Court on appeal. On that basis alone, the Petition for Rehearing should be rejected. The Appellant is not entitled to raise new issues at each successive stage of litigation.

II.

THE APRIL 21, 1980 OPINION OVERLOOKS NO ISSUE.

In its Petition for Rehearing the Appellant incorrectly contends that this Court overlooked its "waiver" argument concerning the five day notice provision. The Appellant is wrong. This Court's Opinion of April 21, 1980 specifically held that:

> All of the invoices submitted by plaintiff to U.S.C. were beyond the five-day limitation period set forth in the foregoing provision; so any claim of U.S.C. against the owner for alleged interference would be deemed waived. Furthermore, plaintiff attributed some of the problems of interference on the congested building site to initial delays in the project caused by rain. The contract between Wyoming and U.S.C. specifically precludes any claim for additional compensation or damages by reason of any delay. Since there is no basis for U.S.C. to claim damages or additional compensation from Wyoming on the claims asserted by plaintiff, plaintiff is not entitled under the provisions of Section 6 of its contract to an increase in the subcontract price, or damages for delay, or interference caused by the acts of the owner, contractor or other subcontractors. (Page 4, Slip Opinion) (Emphasis supplied).

Inherent in the above holding is a rejection of the Appellant arguments. The Court was entitled to conclude in its April 21, 1980 Opinion that neither the record nor the law supports the Appellant's arguments. This Court is not bound to address each and every minor argument raised in the Briefs of the parties. Rather, a holding such as the Court issued in this case encompasses an implicit rejection of the arguments now raised.

In any event, the Court's holding has two bases. First, claims for interference must be submitted within five days of the

occurrence; and, second, Appellant is entitled to no damages caused by the delay relating to the interference. That holding bars Appellant's present arguments.

III.

APPELLANT'S ARGUMENTS FAIL ON THEIR MERITS

Appellant's argument is broken into two parts: First, that the allowance of compensation for damages caused Appellant by a collision between its crane and a Jacob's Engineering crane waived the five day notice provision; and, second, that an offer for a novation of the contract from Appellant dated August 8, 1977 was somehow compliance with the five day notice provision for the remaining performance under the contract.

The latter argument is nonsensical. The August 8, 1977 document is entitled "Proposal" and is coached in terms of a complete renegotiation of the contract between U.S. Construction and Appellant. (R. 237, D-12). Further, it is entitled "Request for Extra Work Authorization and Extension of Time." Id. Appellant now contends, however, that it seeks compensation for interference, not for extra work. In fact, if the request was for extra work, it was specifically rejected, as is indicated on R. 237, D-12, and is therefore of no assistance to Appellant.

Finally, paragraph 9 of the contract between Wyoming Minerals and U.S. Construction, which this Court has held governs the Appellant, provides that

> . . . Any claim of the Contractor arising out of any alleged interference due to the conduct of such other work shall be made to the Owner in writing within five (5) days of the occurrence of the alleged interference and shall be deemed to have been waived unless so made.

Clearly, paragraph 9 of that contract requires submission of a request after the interference. Appellant urges this Court to allow it to redraft that provision to allow submission of one request for all hypothetical, prospective interference. Appellant's argument is that this Court should reject and redraft unambiguous contract language. That argument was rejected by this Court in its April 21, 1980 Opinion.

Appellant devotes greater attention to its waiver argument. Appellant argues that the grant of compensation (R. 237, D-27) for an alleged occurrence of interference in July constituted a waiver of the five day notice provision. That compensation was not approved until the latter part of September, 1977. (R. 237, D-27). From that document, and a preceding meeting, Appellant argues that there has been a retroactive waiver of the five day notice provision for all prior invoices relating to interference. Appellant's argument must be rejected.

As correctly stated in Appellant's Petition for Rehearing, a waiver requires, "an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it." Sandberg v. Klein, 576 P.2d 1291, 1294 (Utah 1978). The right here in question was that U.S. Construction need only consider claims for interference submitted within five days of the occurrence. As is clear from the record, U.S. Construction uniformly

exercised that right throughout Appellant's performance.[1] The only deviation took place when one claim was granted, after all others were rejected. Neither Sandberg nor the other cases cited by Appellant, Vitra-Spray of Florida v. Gumenick, 144 So. 2d 533 (Fla. App 1962) and Rivercliff Co. v. Linebarger, 233 Ark. 105, 264 S.W. 2d 842, cert. den., 348 U.S. 834 (1954) stand for such a retroactive waiver. Appellant's own behavior, in submitting claims for interference in the same format throughout its performance, illustrates that it did not believe that any meeting, or grant of a particular claim, waived any right of U.S. Construction. U.S. Construction uniformly enforced its right to reject untimely claims before and after the August 22, 1977 meeting. (See footnote 1). No "intentional relinquishment of a known right" can be inferred from U.S. Construction's actions.

Broad public policy reasons mitigate against implying any across the board waiver because of the August 22, 1977 meeting or approval of the crane claim. This Court would seriously impede settlement of disputed matters if, in doing so, a person risks compromising prior claim rejections. In a similar case, the court in Sam Finley, Inc. v. Pilcher, Livingston and Wallace, Inc., 314 F. Supp. 654, 655 (S.D. Ga. 1970), a Miller Act suit by a

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[1] Requests for compensation for interference, in the form of invoices, and dated as follows, were rejected by U.S. Construction: June 29, 1977 (R. 237, D-9); July 28, 1977 (R. 237, D-10); August 8, 1977 (R. 237, D-11); August 29, 1977 (R. 237, D-21); August 31, 1977 (R. 237, D-22); and September 12, 1977 (R. 237, D-26). The September 6, 1977 invoice (R. 237, D-24), was the last request for additional compensations submitted by the Appellant that appears on the present record.

materialman against a general contractor and the general contractor's surety, held that negotiation by defendants with plaintiff concerning settlement of a dispute did not constitute a waiver by defendants of the one year statute of limitations. Similarly, in Carpenter International, Inc. v. Kaiser Jamaica Corp., 393 F. Supp. 396 (D. Del. 1975) the Court rejected a waiver argument made by a contractor based on a settlement meeting held to discuss the contractor's claims. This Court should not prejudice the Respondent for their attempts to amicably settle portions of the Appellant's claim by discussing those claims at the August 22, 1977 meeting nor by granting one of many different requests subsequent thereto.

Finally, Appellant makes much of the idea that it was "lulled into believing its claims would be granted in full after the August 22, 1977 meeting. Invoices submitted subsequent thereto, however, completely belie that contention. Specifically, Appellant contends that "had plaintiff been told that its claims were untimely, plaintiff could either have ceased work, or have submitted claims on a daily basis after August 22." After the August 22 meeting, an invoice for work during the week of August 1977 was submitted. (R. 237, D-23). On August 31, 1977 an invoice was submitted for the week of August 22, 1977, detailing the equipment and labor for August 22, 23, 24, and 25. (R. 237, D-22). On September 6, 1977 an invoice was submitted for the week of August 29, 1977, detailing equipment and labor for August 29, 30, 31 and September 1 and 2. (R. 237, D-24). A review of the record shows that Appellant acted no differently after the August

22 meeting than it did before. After, as before, the Appellant continued to submit claims for interference which failed to comply with the contract.

CONCLUSION

Appellant has raised no valid ground for granting its Petition for Rehearing. The matters now raised are not properly before this Court since Appellant failed to properly raise the issues in the lower court. Further, this Court fully considered all matters in its previous Opinion which are now raised by the Appellant. Finally, Appellant's argument is unsupported by the record and is contrary to appropriate policy and the applicable law.

DATED this 23d day of May, 1980.

GORDON L. ROBERTS

DANIEL M. ALLRED

VAL R. ANTCZAK

CERTIFICATE OF SERVICE

I hereby certify that on the 23d day of May, 1980, I delivered two true and correct copies of the foregoing BRIEF IN ANSWER TO PETITION FOR REHEARING to Peter W. Billings, Warren Patten and Charles B. Casper, of and for Fabian & Clendenin, Attorneys for Appellant, 800 Continental Bank Building, Salt Lake City, Utah 84101.