1988

Western Coating Inc. v. Gibbons & Reed, American Insurance Company, Continental-Hagen : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN COATING INC., an Oregon Corporation, Plaintiff and Appellant, vs. GIBBONS & REED, a Utah corporation, AI INSURANCE COMPANY, a a oration and CONTINENTAL-HAGEN, a h Corporation Defendants and Respondents	Case No. 880289

BRIEF OF APPELLANT

Appeal from a Summary Judgment Entered
By the Honorable John A. Rokich
In the Third Judicial District
In and For Salt Lake County, State of Utah

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BRIEF OF APPELLANT

Plaintiff and Appellant Western Coating, Inc. ("Appellant Western Coating"), by and through its counsel of record, hereby submits this Brief.

JURISDICTION AND NATURE OF PROCEEDINGS

This Court has jurisdiction of this matter pursuant to Utah Code Annotated, Section 78-2-2(3), (1953, as amended).

Defendants and Respondents Gibbons & Reed and American Insurance Company ("Respondent Gibbons & Reed and Respondent American Insurance Company or Respondents") brought a Motion for Summary Judgment before the lower court on June 6, 1988. At that hearing, the lower court was asked to determine whether Appellant Western Coating's claim on the payment bond fell within the scope of protection of the Utah Procurement Code, U.C.A. Section 63-56-38, 1953 as amended. (R. 67).

The lower court submitted a Memorandum Decision in the matter granting the Respondents' Motion for Summary Judgment. (R. 68). The lower court ruled that Appellant Western Coating was too remote in the contract chain from the general contractor to come within the protection of the Utah Procurement Code and therefore its claim was barred. (R. 68). Judgement was entered on July 1, 1988. (R. 72). Appellant Western Coating filed a Notice of Appeal in this matter on July 27, 1988. (R. 74). Default judgment had previously been entered against Defendant Continental-Hagen. (R. 15). Said default judgment is not a part of this appeal.

STATEMENT OF THE ISSUE PRESENTED ON APPEAL

Whether Appellant Western Coating's claim for payment of materials that were admittedly supplied to and incorporated into a project in which a payment bond was obtained pursuant to the Utah Procurement Code should be denied simply because it is a supplier in the third tier.

CONTROLLING STATUTE

The controlling statute in this matter is Utah Code Annotated, Section 63-56-38 (1985), hereinafter referred to as the "Utah Procurement Code." A copy of the 1985 enactment of the Utah Procurement Code is found in the Appendix.

STATEMENT OF FACTS

The Utah Department of Transportation entered into a contract with Respondent Gibbons & Reed on or about April 8, 1986 for the construction of the road located at 11th East to 20th

East and I-215 in Salt Lake City (the "Project"). (R. 46). In accordance with Utah's Procurement Code, Respondent Gibbons & Reed obtained a payment bond from Respondent American Insurance Company for the protection of those supplying labor and materials to the Project. (R. 46).

Respondent Gibbons & Reed entered into a subcontract with Pacheco & Martinez wherein Pacheco & Martinez agreed to furnish and install black and epoxy reinforcing steel on the Project. (R. 46). Pacheco and Martinez then entered into a contract with Continental-Hagen for the purchase of the black and epoxy reinforcing steel. (R. 46). Appellant Western Coating contracted with Continental-Hagen to supply Continental-Hagen with epoxy coated re-bar for use on the Project. (R. 3).

Continental-Hagen failed to pay Appellant Western Coating the balance due of $30,904.80 for said materials. (R. 4). Appellant Western Coating made timely demand upon Respondents for payment for the materials it furnished for use on the Project under the payment bond that was furnished pursuant to the Procurement Code. (R. 4).

SUMMARY OF APPELLANT'S ARGUMENT

It is Appellant's position that the Utah Procurement Code stands in lieu of the mechanic's lien statute on public work projects. Just as the mechanic's lien statute protects all who provide labor and materials related to the improvement of real property, the Procurement Code is designed to protect all those

who supply labor and materials to state owned public work projects.

Further, the reference to "subcontractor" in the Procurement Code does not preclude some parties that provided labor or materials to the project from bringing claims under the Procurement Code based on their position in the contract chain. Thus, Appellant Western Coating, as a supplier of materials utilized in the construction of the Project, may bring a claim for payment for materials utilized in the Project pursuant to the provisions of the Utah Procurement Code.

Finally, federal case law relating to the Miller Act is not dispositive.

ARGUMENT

POINT I: THE PROCUREMENT CODE STANDS IN LIEU OF THE MECHANIC'S LIEN ON PUBLIC WORK PROJECTS AS PROTECTION FOR THOSE WHO SUPPLY LABOR AND MATERIALS TO THE PROJECTS.

It is Appellant Western Coating's position that the Utah Procurement Code stands in lieu of the mechanic's lien statutes and is designed to protect all those who supply labor and materials for public works. Thus, any party that actually supplies labor or materials to a public project should be included within the scope of protection provided by the Utah Procurement Code.

Utah courts have long recognized the relation between the mechanic's lien law and the bonding statutes. This relationship was recently reaffirmed in Cox Rock Products v. Walker Pipeline Construction 754 P.2d 672 (Utah App., 1988).

In Cox Rock Products, the Court of Appeals of Utah was asked to review whether the statutes relied on by a supplier to a subcontractor to Ephraim City seeking to recover on a payment bond were in effect at the relevant times. In making its determination, the Court of Appeals reviewed the history of the statutes relating to mechanic's liens and payment bonds.

The Court of Appeals began their review of the history of said statutes by stating the following:

> Ordinarily, one who is not in "privity" with another cannot sue that party to recover on a contract. . . . However, to protect construction suppliers and subcontractors from the harshness of that doctrine, two principal devices have been created -- the mechanic's lien and the payment bond. (Emphasis added.)

Id. at 673.

As the mechanic's lien statute precludes the filing of liens on public buildings, structures or improvements, ". . . suppliers and subcontractors have principally looked for protection to the second device, namely that of the payment bond, when providing labor or supplies for construction projects contracted for by governmental entities." (Emphasis added.) Id. at 674.

In King Bros., Inc. v. Utah Dry Kiln Company, 374 P.2d 254 (Utah, 1962), Utah's Supreme Court stated that "This contractors bond statute is closely related in purpose. . . to that of our mechanics lien statute. . ." King Bros. at 255.

In Crane Co. v. Utah Motor Park, Inc., 8 Utah 2d 413, 335 P.2d 837 (1959), the court stated:

> The purpose of the mechanics and materialmen's lien statutes and likewise the statutes quoted hereinabove, [the private payment bond statutes] is to prevent the owners of land from

> having their lands improved with the materials and labor furnished and performed by a third person, and thus to enhance the value of such lands, without becoming personally responsible for the reasonable value of the materials and labor which enhance the value of those lands. The owner may escape personal liability by obtaining the bond as required by the statute. (footnote omitted)
>
> Crane at 839.

The mechanic's lien statute has always recognized that every supplier to a project falls within the scope of its protection. The mechanic's lien statute, U.C.A. Section 38-1-3 (1953, as amended), states that those entitled to the lien are "Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure. . . ." (Emphasis added.) The mechanic's lien statute does not distinguish amongst parties based on their relation to the general contractor. Likewise, the Procurement Code is not intended to distinguish amongst parties based on their relation to the general contractor.

As the mechanic's lien statute and the bonding statutes are similar in purpose, all suppliers to a project should be included within the scope of protection provided by the Utah Procurement Code. Appellant Western Coating indisputably provided materials to a public project. Appellant Western Coating was not paid in full for the materials it provided to this Project. Appellant Western Coating is precluded by law from filing a mechanic's lien on the Project. Appellant Western Coating's only recourse is on the payment bond which was provided for the protection of those

who provided labor and materials to the Project. The lower court erred in ruling that Appellant Western Coating was too remote to fall within the scope of protection of the Procurement Code. The payment bonds provided pursuant to the Procurement Code are for the protection of all who provide labor and materials to a public project.

POINT II. THE TERM "SUBCONTRACTOR," AS USED IN THE PROCUREMENT CODE, ENCOMPASSES ALL WHO PROVIDE LABOR AND MATERIALS TO A PUBLIC PROJECT.

The Utah Procurement Code states:

> Any person who has furnished labor or material to the contractor or subcontractor for the work provided for in the contract, in respect of which a payment bond is furnished under this section, who has not been paid in full therefor within 90 days from the date on which the last of the labor was performed by him or material was supplied by him for which the claim is made, may sue on the payment bond for any amount unpaid at the time the suit is instituted and may prosecute the action for the amount due him. (Emphasis added.)

The language of the Procurement Code was not intended to bar claims of those not in direct privity with the general contractor or the first tier subcontractor. The Procurement Code is for the protection of those parties that provide labor or materials as provided for in the contract. Appellant Western Coating contends that the use of the term "subcontractor" in the Procurement Code is used generically and should not be used to drive a wedge between those who provide labor or material equally vital to the work provided for in the contract.

Colorado's Supreme Court, in South-way Construction Co. v. Adams City Service, 458 P.2d 250, 251 (Colorado, 1969), faced an

issue practically identical to the present issue, and determined that a supplier to a sub-subcontractor could bring a claim for payment under a payment bond provided pursuant to Colorado's public bonding statute.

Colorado's public bonding statute states that a claim may be filed by any person who has furnished labor or materials "used or consumed by such contractor or his subcontractor, in or about the performance of the work contracted to be done. This language referring to "contractors and subcontractors" is very similar to the language of Utah's Procurement Code. However, Colorado's Supreme Court did not find that the language referencing a subcontractor was limiting with respect to which parties could file claims. In making its determination that the term subcontractor has a very broad meaning, Colorado's Supreme Court stated:

> To construe the term "subcontractor" so as to exclude a "sub-subcontractor" from the protection granted by the contractor's bond statute would require us to ignore the purpose of the statute. Since the benefits of our mechanic's lien act do not apply to projects constructed by governmental agencies, a remedy similar to our mechanic's lien statute was provided by the legislature for the protection of those furnishing supplies or material for such projects. . . The statute stands in lieu of the mechanic's lien statute and is designed to protect those who supply labor and materials for public works."

South-way Construction Co. v. Adams City Service, 458 P.2d 250, 251 (Colorado, 1969).

Likewise, under Massachusetts law, suppliers to a sub-subcontractor or second-tier subcontractor are protected under the public bonding statute. In Peters v. Hartford Accident and

Indemnity Company, 389 N.E.2d 63, (Mass. 1979), the Massachusetts Supreme Court was asked to review whether the legislature intended to curtail the scope of coverage of the public bonding statute by its 1972 amendment which states:

> Any claimant having a contractual relationship with a subcontractor performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor but no contractual relationship with the contractor principal furnishing the bond shall have the right to enforce any such claim as provided . . .

In making its determination regarding the above language, the court first stated that the public bonding statute is an outgrowth of the mechanics' lien statutes which do not have distinctions between subcontractors and is to provide security to those who furnish labor or materials to public works.

The court went on to rule:

> We do not construe the words, '[a]ny claimant having a contractual relationship with a subcontractor performing . . . pursuant to a contract with the general' as barring all claims against a subcontractor not in direct privity with the general contractor. . . Rather, it more generally signifies acts done in accordance with, by reason of, in agreement with, or in the prosecution of, the contract. . . Ultimately, a sub-subcontractor who performs a portion of the contract performs it 'pursuant to a contract with the general contractor,' although his relationship with the contract is indirect . . . Finally, the result we reach furthers the public policy of ensuring security for all laborers working at a public project site, and thereby promotes the unhampered completion of such projects. (Emphasis added)

Peters at 67, 68.

Appellant Western Coating requests this court to adopt the position taken by the Colorado and Massachusetts state courts and rule that all entities providing labor or materials to public projects fall within the protection of Utah's Procurement Code.

POINT III. DECISIONS RELATING TO THE FEDERAL MILLER ACT ARE NOT DISPOSITIVE OF ISSUES RELATING TO THE UTAH PROCUREMENT CODE.

In the lower court proceeding, Respondents relied on court rulings relating to the Miller Act. The Miller Act is the federal government's public bonding statute and federal courts, based on federal legislative history, have ruled that suppliers to materialmen cannot recover under public contractor's bonds provided pursuant to the Miller Act. Some state courts have adopted similar rulings to the Miller Act when ruling on this issue.

Even though Utah's public bonding statutes have, on occasion, been referred to as the "Little Miller Act,"[1] Utah is not bound to adopt federal court case law interpreting the Miller Act when ruling on issues relating to Utah's Procurement Code. Federal case law relating to the Miller Act is not controlling on this specific issue relating to the Utah Procurement Code. And, as presented in this Brief, other state courts have not felt bound to Miller Act case law when interpreting their respective states' public bonding statutes.

In State of New Mexico, ex. rel. W.M. Carroll & Co. v. K.L. House Construction Co., Inc., 656 P.2d 236 (N.M. 1982), New

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[1] In Cox Rock Products, the Appellate Court referred to Utah's original public bonding statute, U.C.A. Section 14-1-5 as the "Little Miller Act." While providing similar relief to that of the Miller Act, said Section is not identical to the Miller Act. It has been amended numerous times and it was even repealed in 1980 and then reenacted in 1983. Further said section is not even the statute which governs the instant matter, although it provides similar relief.

Mexico's Supreme Court was asked to decide whether a third tier supplier was entitled to protection under New Mexico's "Little Miller Act." The trial court had determined, on summary judgment, that the third tier supplier was entitled to protection under New Mexico's "Little Miller Act."

New Mexico's Supreme Court began its discussion with, "The Little Miller Act is modeled after the federal Miller Act. . . These statutes are intended to provide a remedy equivalent to that of a materialmen's lien, which ordinarily may not attach to government property." Carroll & Co. at 236. While acknowledging that the federal courts have determined that suits may only be brought under the Miller Act by parties having a direct contractual relationship with the general or a subcontractor who in turn deals directly with the general contractor, the New Mexico court reached a different result with respect to their "Little Miller Act."

The New Mexico Supreme Court stated:

> We recognize that the federal cases are contrary, but those cases rely on legislative history which is inapplicable to the New Mexico statute.
>
> Our conclusion is supported by analogy to the provisions governing mechanic's and materialmen's liens. Under Section 48-2-2, N.M.S.A. 1978, a party in Carroll's position would have a lien on the building if the construction project were private. Because the project involved here is governmental, no lien can attach.

Carroll & Co., at 237, 238.

Thus, the court held that New Mexico's "Little Miller Act" provided coverage to suppliers of materials under any subcontract involving a state construction project.

Each state court interprets its own statutes, including those statutes governing the bonding of public projects. Regardless of whether these statutes are even nicknamed the "Little Miller Act," states are not bound to adopt federal Miller Act case law when making rulings on their "Little Miller Acts." Utah's appellate courts have not yet ruled on this issue and this court is free to make a ruling aside from the Miller Act decisions.

CONCLUSION

The public payment bond statutes stand in lieu of the mechanic lien statutes on public work projects. As parties supplying labor or materials to public work projects are prohibited from filing liens on the projects in the event they are not paid, their only recourse is to institute an action on the payment bonds that are provided pursuant to law. In the instant action, a payment bond was obtained pursuant to Utah's Procurement Code for the protection of all who supplied labor or materials to the Project. Appellant Western Coating indisputably supplied materials to the Project and was not paid for the materials it supplied to the Project. Appellant Western Coating's only recourse is on that payment bond which was provided for its protection.

The references to "subcontractor" in the Procurement Code should not limit those able to file claims under the Procurement Code. The term "subcontractor" is very broad and applies to those who supply labor and materials. All entities that provide

labor or materials to a state-owned project should fall within the protection of Utah's Procurement Code.

Appellant Western Coating respectfully requests this court to reverse the lower court's determination on Summary Judgment that Appellant Western Coating was outside the scope of protection of the Utah Procurement Code.

DATED this 29th day of December, 1988.

WALSTAD & BABCOCK

By: Mary Louise LeCheminant
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, the requisite copies of Appellant's Brief to Bryce Roe, Attorney for Respondents, Fabian & Clendennin, 215 South State Street, Salt Lake City, Utah 84111 this 29th day of December, 1988.

Mary Louise LeCheminant

APPENDIX

63-56-37. Bid security requirements.

(1) Bid security in amount equal to at least 5% of the amount of the bid shall be required for all competitive sealed bidding for construction contracts. Bid security shall be a bond provided by a surety company authorized to do business in this state, the equivalent in cash, or any other form satisfactory to the state.

(2) When a bidder fails to comply with the requirement for bid security set forth in the invitation for bids, the bid shall be rejected unless, pursuant to rules and regulations, it is determined that the failure to comply with the security requirements is nonsubstantial.

(3) After the bids are opened, they shall be irrevocable for the period specified in the invitation for bids, except as provided in section [Subsection] 63-56-20(6). If a bidder is permitted to withdraw a bid before award, no action shall be taken against the bidder or the bid security.

History: C. 1953, 63-56-37, enacted by L. 1980, ch. 75, § 1.

63-56-38. Bonds necessary when contract is awarded.

(1) When a construction contract is awarded, the following bonds or security shall be delivered to the state and shall become binding on the parties upon the execution of the contract:

(a) a performance bond satisfactory to the state, in an amount equal to 100% of the price specified in the contract, executed by a surety company authorized to do business in this state or any other form satisfactory to the state; and

(b) a payment bond satisfactory to the state, in an amount equal to 100% of the price specified in the contract, executed by a surety company authorized to do business in this state or any other form satisfactory to the state, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract.

(2) Rules may provide for waiver of the requirement of a performance or payment bond where a bond is deemed unnecessary for the protection of the state.

(3) Any person who has furnished labor or material to the contractor or subcontractor for the work provided in the contract, in respect of which a payment bond is furnished under this section, who has not been paid in full within 90 days from the date on which the last of the labor was performed or material was supplied by the person for whom the claim is made, may sue on the payment bond for any amount unpaid at the time the suit is instituted and may prosecute the action for the amount due the person. Any person having a contract with a subcontractor of the contractor, but no express or implied contract with the contractor furnishing the payment bond, has a right of action upon the payment bond upon giving written notice to the contractor and surety company within 90 days from the date on which the last of the labor was performed or material was supplied by the person for whom the claim is made. The person shall state in the notice the amount claimed and the name of the party for whom the labor was performed or to whom the

material was supplied. The notice shall be served by registered or certified mail, postage prepaid, on the contractor and surety company at any place the contractor or surety company maintains an office or conducts business.

(4) Any suit instituted upon a payment bond shall be brought in the district court of the county in which the construction contract was to be performed. No suit may be commenced by a claimant under this section more than 180 days after a surety finally denies that claimant's claim. The obligee named in the bond need not be joined as a party in the suit.

History: C. 1953, 63-56-38, enacted by L. 1980, ch. 75, § 1; L. 1985, ch. 202, § 1.

Amendment Notes. — The 1985 amendment deleted "and regulations" after "Rules" in Subsection (2); substituted "may sue" for "shall have the right to sue" in the first sentence of Subsection (3); deleted "However" at the beginning of the second sentence of Subsection (3); inserted "and surety company" in the second sentence of Subsection (3); deleted "personally or" after "served" in the last sentence of Subsection (3); substituted "on the contractor" for "in an envelope addressed to the contractor" in the last sentence of Subsection (3); inserted "and surety company" and "or surety company" in the last sentence of Subsection (3); deleted "but no suit shall be commenced later than one year from the date on which the last of the labor was performed or material was supplied by the person bringing the suit" at the end of the first sentence of Subsection (4); added the second sentence of Subsection (4); and made minor changes in phraseology.

NOTES TO DECISIONS

Analysis

Burden of proof.
Timeliness of action.
Work performed without contract.

Burden of proof.

In action by materialman on payment bond, materialman did not have the burden to prove that the materials furnished were actually delivered to the job site or that they were actually incorporated into the structure, but only that the materials were furnished in connection with the particular project. City Elec. v. Industrial Indem. Co., 683 P.2d 1053 (Utah 1984).

Timeliness of action.

The appropriate test for determining whether an action on a payment bond was brought within the required statutory time period was not the "substantial completion" date; it was rather whether the material in question was supplied as a part of the original contract or for the purpose of correcting defects or making repairs following inspection of the project. City Elec. v. Industrial Indem. Co., 683 P.2d 1053 (Utah 1984).

Work performed without contract.

Where construction company proceeded to demolish race track and install a soccer field for Utah Golden Spikers and state of Utah without an executed agreement and without compliance with § 64-1-4, there was no contract with the state of Utah by which it was obliged to require the Golden Spikers to furnish performance and payment bonds. Breitling Bros. Constr. v. Utah Golden Spikers, Inc., 597 P.2d 869 (Utah 1979).

63-56-39. Form of bonds — Effect of certified copy.

The form of the bonds required by this part shall be established by rules and regulations. Any person may obtain from the state a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.