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Walter W. Sprague and United States Fidelity & Guaranty Company v. Boyles Bros. Drilling Company : Appellant's Reply Brief

Utah Supreme Court

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Supreme Court of the State of Utah

WALTER W. SPRAGUE and UNITED
STATES FIDELITY & GUARANTY
COMPANY, a corporation,

Respondents,

v.

BOYLES BROS. DRILLING COM-
PANY, a corporation,

Appellant.

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Case No.
8351

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

STATEMENT OF FACTS

The disagreement between the respective parties' statement of facts is negligible, and the additional facts stated by respondents are without legal consequence.

ARGUMENT

POINT I.

Respondents agree that Sprague did not remove any rock from the quarry until May 7, although all of the rock exposed in the quarry by the explosion of February 3, was reduced to contract size by appellant as early as February 23. They do not question appellant's authorities which demonstrate that this admitted breach of Sprague's covenants precludes respondents from recovering any damages on account of the delay in the performance of his prime contract.

Respondents attach no legal significance whatever to their failure to furnish appellant compressed air after the Bergraph 315 compressor broke down and was removed from the quarry on September 21. This breach goes to the very heart of the subcontract, because it stopped completely all of defendant's operations in the quarry. We are aware that the small LeRoi compressor was available, but it was virtually useless to the defendant at that time (R. 370). It could be used only to operate one small drill for secondary breaking (R. 370). As it was necessary to do primary rock breaking at that time, the failure to furnish a compressor of the capacity of the Bergraph 315 put an end to the production of rock in the quarry (R. 367-8).

Although respondents' counsel ignore this glaring default, their superintendent was fully aware of its significance. We again refer to his testimony at pages 411, 412 and 414 of the record where he indicates the critical situation caused by the breakdown of the 315 compressor and describes his persistent and far-flung efforts to replace it.

Appellant's contention that Sprague's failure to remove the contract size rock from the quarry with any degree of promptness and to furnish compressed air following the breakdown of the Bergraph compressor precludes any recovery by respondents and gives rise to a cause of action in favor of appellant remains unchallenged, except for the bald assertion that appellant did not break the rock in the manner or within the time provided for in the contract. Respondents appear to be under the impression that appellant was to break the full amount of rock required by the contract into the size therein specified by either a single explosion or by carving chunks of contract size rock out of the wall of the quarry. That the parties did not contemplate any such operation is demonstrated by the fact that they expressly provided in the contract for secondary breaking of rock.

We cannot determine from respondents' brief whether they contend that the contract required appellant to deliver the contract size rocks into trucks at the mouth of the quarry, or to furnish respondents a traxcavator, a dragline, a tractor, and a shovel for that purpose. Perhaps both contentions are made. Neither of them can be maintained. The full extent of work required of appellant by the contract was to break into specified sizes in the quarry the native rock constituting the walls of the quarry. It did not agree to furnish any equipment or machinery of any kind or character. It did not agree to do any sorting, loading, moving, hauling or delivering.

Since it is conceded by respondents that no contract size rock was removed from the quarry until the middle

of May, it is immaterial whether they are correct in stating that all acceptable rock was removed from the quarry in that month. However, such is not the fact. According to the records maintained by the Government and by Mrs. Sprague and the testimony of respondents' superintendent (R. 117), a large amount of contract size rock broken in February was not removed from the quarry until the last two or three days of July and the first two or three days of August.

It is true that respondents did some secondary breaking of rock in the latter part of July and the early part of August. They are in error in charging the cost of this work against appellant. The work was done after appellant abandoned the contract in the latter part of April or first of May. Being legally justified in stopping performance, appellant was under no obligation to resume performance. It resumed the production of rock only after receiving the payment due April 20, and being assured by United States Fidelity & Guaranty Company that it would assume the obligations of Sprague under the contract. Whatever work respondents did in the way of breaking rock in the quarry after appellant left the quarry in the latter part of April and before it resumed breaking the rock in August is not chargeable against appellant.

An additional fact justifying the appellant in quitting the quarry in the latter part of April was the failure of Sprague to make the payment due on the 20th of that month. On page 17 of their brief, respondents admit that the amount due appellant on April 20, was \$4392.00. Sprague's surety finally paid the installment on July 26,

using the payment as a means of inducing appellant to resume the breaking of rock.

Respondents attempt to minimize their breach of the covenant to furnish sufficient compressed air to operate defendant's drills efficiently by pointing out that appellant did not request Sprague to furnish a man to start the compressor and that Sprague did not refuse to take steps to have the compressor repaired when needed. While the contract, in our opinion, clearly required Sprague to supply an operator to start the compressors and keep them running, appellant does not claim any damages or that it was justified in stopping work in the quarry on either the last of April or the 5th of October, because of the failure to furnish such operator. Neither does the appellant contend that Sprague ever refused to repair any compressor. It is clear, however, from the testimony of his partner wife that he did not consider that he was under any duty to furnish appellant with compressed air except for a brief period at the outset of the operations (See R. 147-8).

Respondents admit "there was some difficulty about compressed air." We construe this admission to mean that while there was a breach of the covenant to furnish compressed air, the breach was not so material as to justify the appellant in failing to break the full amount of rock specified by the contract, but can be adequately compensated by an award of damages. We agree that for the breach of the covenant to furnish compressed air up to the latter part of April, an award of damages would be an adequate remedy. We cannot agree, however, that respondents' failure to furnish appellant sufficient compressed air to operate

its drills efficiently after the Bergraph compressor broke down on September 21, was not a sufficiently material breach to justify the appellant abandoning the contract on October 5, or that an award of damages would alone be an adequate remedy.

When the Bergraph compressor broke down on September 21, appellant's operations had reached the point where it was necessary to do additional primary breaking of rock. The small LeRoi compressor was useless for the purpose of drilling the holes required to do the primary breaking. As a matter of fact, it would operate only one small jack hammer and that inefficiently. Without a compressor of the capacity of the Bergraph 315, all rock breaking operations in the quarry were at a complete standstill. It was impossible to break the rock without drills, and it was impossible to operate the drills without an air compressor. Appellant's men and equipment stood by idle in the quarry for more than two weeks while respondents' superintendent spent "hours and hours and hours" on the telephone contacting "every equipment house and contractor, or anybody who I thought might have a compressor or know of a compressor throughout the state and two surrounding states." Under these circumstances, the question whether respondents' breach of the covenant to furnish compressed air after September 21, was substantial enough to justify defendant in abandoning the work is not open to debate.

Respondents' citation from Restatement of the Law of Contracts sets forth certain considerations for determining whether a failure to perform a contract is so material as to

relieve the other party from performance of a corresponding promise. Applying those considerations to the case at bar requires a holding that appellant was relieved of the duty of breaking the specified amount of rock by the failure of respondents to furnish it with compressed air as provided in the contract.

POINT II.

Respondents make no complaint whatever of the ruling of the trial court sustaining appellant's objection to their offer of proof of what respondents refer to as the proper method of producing rock in this quarry.

The ruling is not complained of, because it was obviously correct. In neither the complaint, the amended complaint in Case No. 96365, nor in the complaint in the present case did plaintiffs even suggest or intimate that appellant broke the rock in an unworkmanlike manner. There was no pretrial order enlarging the issues raised by the pleadings. The trial court correctly rejected the appellant's offer of proof, because there was no issue raised by the pleadings to which it was material.

Furthermore, what respondents offered to prove were certain theories that by drilling holes on the top of the wall of the quarry the rock could be broken to contract size without secondary breaking. This theory was exploded by respondents themselves. After appellant left the quarry, they drilled holes on the top of the quarry by a wagon drill (an oversized jack hammer R. 133). That the rock broken in this manner had to be rebroken by secondary blasting

is demonstrated by the testimony of their superintendent at R. 128-129.

Notwithstanding the assertion of respondents' counsel to the contrary, appellant did some primary breaking by drilling the holes from the top of the quarry wall. See R. 367-8.

It must be remembered that the initial explosion broke several thousand tons of rock from the quarry wall, and that at the time respondents and appellant did primary breaking by drilling holes on top of the quarry wall, only a small amount of rock remained to be broken. It requires no expert testimony to demonstrate that this method of primary breaking was slow and tedious compared to the coyote hole method. We repeat, however, that each method required secondary breaking.

Respondents' counsel states that the record is full of testimony to show that appellant did not break the rock in a workmanlike manner, but he fails to point out any whatsoever. We submit that there is none.

POINT III.

Respondents in effect request this court to vacate so much of the memorandum decision of the trial court as determined that the cost to Sprague of breaking the additional rock required to complete the prime contract after appellant left the quarry was less than the contract required to be paid appellant. If this could be done, it would simply

leave the record destitute of a finding essential to support an award of damages to respondents.

Our contention that the evidence is insufficient to show that it cost respondents more than the contract price to produce the additional rock after appellant terminated its operations, because there is no segregation of the cost of compressed air is entirely ignored in respondents' brief. Accordingly, our position in this regard should be taken as confessed.

Neither do respondents attempt to sustain the ruling of the trial court admitting in evidence the packages and bundles marked Exhibits 16-P, 16P-a, 23-P and 23-Pa, other than to say that they "believe that these exhibits and others of similar character were * * * properly received in evidence." No reasons are given for respondents' belief. No authorities are cited and no exception is taken to appellant's authorities which hold that its objections to those exhibits were well taken.

POINT IV.

To support the award of \$823.15 for so-called increased cost of loading and hauling rock, respondents rely upon their Exhibit 31-P. This Exhibit was composed by Mrs. Sprague, a partner with her husband in the project. The Exhibit is a completely self-serving document and is without any authenticity or foundation whatsoever. The statement of Mrs. Sprague that it was based upon files and records in her possession can give the instrument no weight whatever. A person cannot lift himself by his own boot-

straps. The instrument has no more probative value than the statement of respondents' counsel in his brief.

Apart from the absence of any evidence to support the item of damage under consideration, there is no basis in the contract for imposing upon the appellant any cost of loading or hauling the rock whether such costs were increased or decreased. If, as has been demonstrated there is no evidence that appellant broke the rock in an unworkmanlike manner, it follows that it discharged its entire duty under the contract by breaking the rock to contract size in the quarry. The matter of loading and hauling the rock was the sole concern of the respondents.

POINT V.

Respondents admit that Sprague defaulted in the payment due under the terms of the contract on April 20, and that under the decisions of this court cited in our main brief appellant was justified in abandoning the contract. Since it did abandon the contract on May 1, it follows from respondents' admissions that appellant is not liable for delay on the part of Sprague in the performance of his prime contract. It is, therefore, unnecessary to again refer to evidence of Sprague's financial collapse, weather conditions, restrictions upon the use of highways for hauling rock and the changes in the plans of the levee whereby the revetment was extended an additional 300 feet (see Exhibit 4-P), all of which contributed heavily to Sprague's failure to complete the prime project on time.

It is immaterial whether appellant abandoned the work on May 1 because of Sprague's failure to make the April 20 payment or because of some other breach of the contract by him.

Admittedly appellant resumed the work of breaking the rock after receiving from the Surety Company the payment of July 26. It did so solely upon the assurance of the Surety Company that it would comply with all of Sprague's covenants in the contract. Appellant continued its operations thereafter until respondents failed to supply it with compressed air after the Bergraph compressor broke down on September 21.

POINT VI.

In our opening brief we cited evidence which established that after appellant abandoned the contract about the first of May, the United States Fidelity & Guaranty Company induced appellant to resume the work of producing rock in the quarry, and assumed the obligations of Sprague under the contract, thereby becoming liable primarily for failure to furnish to appellant compressed air to operate its drills. Respondents in answer to this contention merely assert that the evidence cited does not have the effect which appellant attached to it. No authorities are cited by respondents and no exception is taken to those cited by appellant. We submit that our construction of the evidence is correct.

We also pointed to the allegations of plaintiffs' complaint in case No. 96365 wherein the United States Fidelity

& Guaranty Company affirmatively alleged that it became obligated to perform the contract between Sprague and Boyles Bros. Drilling Company, and that it did perform the contract. Respondents counsel pleads a most pathetic confession of embarrassment for having made these allegations.

Why these allegations should cause counsel any distress is extremely difficult to comprehend. The allegation that the Surety Company became obligated to perform the contract is strictly in accord with the facts as disclosed by the evidence cited in our opening brief. Of course, the allegation that it performed the contract is contrary to the undisputed evidence, but that is in the last analysis a conclusion of law. Plaintiffs' pleadings are full of similar erroneous conclusions, and, of course, the same could be said of their brief.

The allegation that United States Fidelity & Guaranty Company issued its bond for the performance of the contract between Boyles and Sprague, although not strictly accurate, is not so out of line with the facts as to call for any apology. It did issue its bond, and that bond was for the benefit of Boyles Bros., as a supplier of labor which went into the project covered by the prime contract.

The statement in respondents' brief that the trial court found that there was no failure to furnish compressed air is contrary to the record. The trial court made no finding whatever upon that issue as we have shown under Point VIII of our brief.

POINT VII.

Inasmuch as respondents in effect confess error with respect to the award of \$292.80 for rock purchased by them, there is no occasion to do more than agree with counsel that this error alone would not require a reversal of the judgment or the granting of a new trial. But the record in this case contains numerous other errors which cannot be corrected by a simple order reducing the judgment.

POINT VIII.

To the respondents' inquiry as to what would have been added by the finding "plaintiff furnished defendant with compressed air to operate its drills efficiently," the answer is that there would have been a determination of at least one of the material issues raised by the pleadings. Of course, the finding would have been contrary to the undisputed evidence, but it would indicate that the trial court understood what at least one of the issues were.

Respondents say that when it comes to the breaches of the contract on the part of the defendant, the findings are specific and exact. They contend that the memorandum decision must be regarded as part of the findings of fact. But if this be allowed, there still is a complete failure to find upon the material issues raised by the pleadings. In this connection, it will be remembered that the respondents repudiated the memorandum decision wherein it was determined that the cost to respondents of producing the rock after appellant left the quarry on October 5, was less than the cost under the contract sued upon.

We agree that the memorandum decision discloses that the trial court did determine that while there was a breach of Sprague's covenant to furnish appellant with enough compressed air to operate its drills efficiently, the breach was not sufficient to authorize a rescission or cancellation of the contract. We emphasize again that appellant does not claim any right to rescind or cancel the contract. It is, therefore, unnecessary to consider whether the breach of Sprague's covenants would or would not justify the remedy of rescission or cancellation.

POINT IX.

The proposition discussed in Point IX of our opening brief was predicated upon an assumption contrary to the record that there was some conflict in the evidence with respect to the issues raised by the pleadings. Since respondents do not seriously contend that any such conflict exists, the matter discussed in our Point IX has become moot.

POINT X.

Respondents make a very plausible argument to the effect that they should have been permitted to file their amended complaint in Case No. 96365. The difficulty confronting respondents is that the argument is untimely. They have not appealed from the order denying them the right to file the amended complaint. That order still stands in full force and effect. It surely must be accorded some legal force or effect.

It is amusing of respondents to complain of being deprived of their day in court. They were in court on their original complaint, and nothing has occurred to prevent them from being fully heard in that action. The ruling of the court refusing to allow them to file the amended complaint did not prevent them from going forward. If the ruling were erroneous, it could have been corrected by appeal.

Respondents have been accorded not only their day in court, but actually have been using two days.

CONCLUSION

Respondents have not only failed to answer appellant's objections to the judgment appealed from, but have not even grappled with the problems. They have ignored the principles of law involved. They agree with the facts as outlined in appellant's brief and do not point out any additional facts of any legal significance. They admit that the covenant of Sprague to furnish appellant with sufficient compressed air to operate its drills efficiently was broken, that Sprague failed to remove the rock from the quarry as required by the contract, and that the payment due appellant was not made until three months late.

A number of errors set out in our brief are either expressly or impliedly confessed.

We respectfully submit that the judgment should be reversed with directions to enter judgment in favor of appellant.

Respectfully submitted,

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