

1980

# Interiors Contracting Incorporated et al v. Navalco et al : Brief of Cross-Claim Defendant and Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

INTERIORS CONTRACTING, )  
 INCORPORATED, and ACTION FIRE )  
 SPRINKLER COMPANY, a Utah )  
 corporation, )  
 )  
 Plaintiffs and Respondents, )  
 )  
 v. )  
 )  
 NAVALCO, a Utah corporation, aka )  
 NAVALCO OF UTAH, et al., )  
 )  
 Cross-claimant and Appellant, )  
 )  
 v. )  
 )  
 GREEN ACRES OF AMERICA, INC., )  
 )  
 Cross-claim Defendant and )  
 Respondent. )

Case No. 17096

BRIEF OF CROSS-CLAIM DEFENDANT AND RESPONDENT

\* \* \* \* \*

Appeal from a Judgment of the  
 Third Judicial District Court  
 in and for Salt Lake County, Utah  
 The Honorable Christine M. Durham, Judge  
 The Honorable David K. Winder, Judge

\* \* \* \* \*

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FILED  
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aka NAVALCO OF UTAH, et al., )

Defendant- )  
Appellant, )

v. )

GREEN ACRES OF AMERICA, INC., )

Cross-claim )  
Defendant- )  
Respondent. )

\* \* \* \* \*

BRIEF OF CROSS-CLAIM DEFENDANT AND RESPONDENT

\* \* \* \* \*

NATURE OF THE CASE

Cross-claimant and appellant, Navalco of Utah ("Navalco"), seeks to overturn the finding of the lower court that it waived its cross-claim against Green Acres of America ("Green Acres") for failure to present the cross-claim to the trial court.

DISPOSITION IN LOWER COURT

Based upon the representations of counsel for Navalco and Green Acres that settlement had been reached between the

parties and no further action on the cross-claim was required by the trial court, Judge Winder did not rule on the cross-claim brought by Navalco as against Green Acres. Subsequently, Judge Durham denied Navalco's Motion to Amend the Findings of Fact, Conclusions of Law and Judgment and Decree whereby Navalco moved the court for judgment on the cross-claim of Navalco as against Green Acres. Judge Durham held that Navalco had waived its cross-claim against Green Acres by failing to present the issue for decision at trial.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks to have the denial of the lower court's Motion to Amend the Findings of Fact, Conclusions of Law and Judgment and Decree affirmed on the basis that Navalco waived its cross-claim against Green Acres.

#### STATEMENT OF FACTS

Respondent agrees with that portion of appellant's statement of facts as it describes the lease arrangements among Navalco, Green Acres, and Hungry Hawaiian, Inc. and its statement that the Hungry Hawaiian, Inc. "engage[d] various persons to apply materials to the premises (e.g. Exhibit 2-P), but thereafter found itself unable to pay all the amounts due." Respondent further agrees with appellant's statements that liens were filed against the premises by certain of the parties named to this action and that all claims as against Green Acres and Roy E. and Carol M. Christensen were dismissed with the exception of the

claim between Green Acres and Lincoln, Tohara and Tohara. Further, respondent agrees with appellant's statements that it filed a cross-claim against Green Acres of America "claiming that pursuant to the provisions of the lease, said Defendant was obligated to hold Defendant-Appellant, Navalco of Utah, harmless for any loss in these proceedings" and that Judge Winder made no ruling on said cross-claim. However, respondent controverts certain of the facts set forth by appellant beginning in the last paragraph of page 5 of its brief whereby appellant attempts to establish the facts underlying its failure to present its cross-claim at trial and the subsequent finding of waiver of the cross-claim.

Beginning November 6, trial of the above-entitled matter, Interiors Contracting, Inc. v. Navalco, was had before the Honorable David K. Winder. Pursuant to the Pre-Trial Order entered by the Honorable Jay E. Banks all remaining issues in the case were before Judge Winder for decision, including the cross-claim of Navalco by which it sought indemnification from Green Acres with respect to any judgment entered against it on any pending mechanics' lien claims, as well as reimbursement for attorneys' fees and costs incurred by it in defending the claims brought against it. (R.688)

Prior to trial, settlement negotiations were entered into by counsel for Navalco, Mr. Glen H. Hatch, and counsel for Green Acres, Ms. Barbara K. Polich. (R. 979-980, Affidavit of



Glen H. Hatch). During the negotiations, Navalco sought to be reimbursed for only those attorneys' fees incurred by Navalco through the bringing of its motion for summary judgment against all lien claimants, despite the fact that the court denied Navalco motion with respect to Action Fire Sprinkler Company and Interiors Contracting, Inc. Mr. Hatch stated that inasmuch as it was the actions of Navalco rather than the actions of Green Acres that caused this claim to continue to trial, Navalco should be responsible for incurring those attorneys' fees and costs. (R. 979-980, Affidavit of Glen M. Hatch; R. 930, Affidavit of Barbara K. Polich). Mr. Hatch further stated to counsel for Green Acres that he did not believe a judgment could be rendered against Navalco except to the extent that Navalco induced reliance by the claimants to finish the job. Specifically in his affidavit Mr. Hatch states that he

[A]ssumed that the only issue involving Navalco remaining in the case was in the nature of an estoppel question as between Navalco and the Plaintiffs [Interiors Contracting, Inc. and Action Fire Sprinkler Company] resulting from certain conversations between the Plaintiffs and Navalco's agents that Affiant did not assume reimbursement would be required for this.

(R. 979-980).

Mr. Hatch represented to counsel for Green Acres that attorneys' fees had been incurred in the approximate amount of \$2,300, which amount did not include the attorneys' fees incurred to continue to defend against the claims of Action Fire Sprinkler

Company and Interiors Contracting, Inc. subsequent to the denial of summary judgment. (R. 980, Affidavit of Glen M. Hatch). Green Acres offered to pay \$2,000 of the amount incurred for attorneys' fees and costs if the cross-claim was dismissed in its entirety. Mr. Hatch at that time indicated to Ms. Polich that he would accept payment of \$2,000 as settlement of the cross-claim. It was agreed that both parties would review the final written document setting forth the oral agreement. (R. 929-930, Affidavit of Barbara K. Polich).

On that basis, a representation was made to Judge Winder by Ms. Polich that Green Acres and Navalco had reached a settlement and therefore the trial court need not consider the cross-claim of Navalco as against Green Acres. This representation was made at the close of putting on evidence on the claims pending between Interiors Contracting, Inc. and Action Fire Sprinkler Company and Navalco and at such time as Mr. Hatch asked leave of the court for his dismissal. In responding to the court's inquiry as to whether or not anyone had any objections to Mr. Hatch leaving, Ms. Polich responded as follows:

No. I just wanted to have--there is a Cross-Claim pending between Navalco and Green Acres, but we have reached a tentative settlement. So for your information, there will be nothing on that.

(R. 1232). Mr. Hatch did not take issue with the statement of Ms. Polich at that time nor did he indicate to the court at any other time during the trial that Navalco's cross-claim was still viable and still before the court.

Subsequent to trial but prior to a decision being rendered, the Settlement Agreement was drafted by Ms. Polich. Ms. Polich called Mr. Hatch and went over each of the points of the Settlement Agreement. (R. 931, Affidavit of Barbara K. Polich). At that time the draft agreement contained provisions of payment to Navalco by Green Acres for \$2,000, assignment to Green Acres of awards of attorneys' fees made to Navalco, and dismissal of the cross-claim in full. (R. 933-937, Settlement Agreement). Counsel for the parties represented that each had received approval from their respective clients to the terms of the agreement. However, it was understood that each party could revise the final written draft to insure it reflected the terms of the oral agreement. Subsequently, the agreement was sent to Mr. Hatch by Ms. Polich. (R. 931).

Subsequent to December 13, 1979, the date the Memorandum Decision was issued by Judge Winder, Mr. Hatch reviewed the settlement agreement and at that time first informed counsel for Green Acres that Green Acres should be responsible for reimbursing Navalco for the judgment which had been rendered against it. (R. 981, Affidavit of Glen M. Hatch; R. 930-931, Affidavit of Barbara K. Polich). Counsel for Green Acres pointed out that it had been agreed by counsel as part of the settlement agreement that all claims were to be dismissed, including any indemnification claims with respect to any and all judgments rendered against Navalco. Mr. Hatch indicated at that time that that was not his

intent. He subsequently returned the settlement agreement. However, it is significant to note that Mr. Hatch indicated to counsel for Green Acres that the settlement agreement adequately reflected the agreement entered into by the parties with respect to attorneys' fees. The only issue of dispute was whether or not the cross-claim was to have been dismissed in total. (R. 931, R. 981).

At no time was any exception made in the pre-trial order, or by any ruling of the court during trial, to preserve the issue of Navalco's cross-claim against Green Acres for decision subsequent to the trial. Therefore, Green Acres did not try that issue nor argue it to the court, nor did Navalco do so.

On December 18, 1979, Navalco filed its Motion to Amend Findings of Fact, Conclusions of Law, and Judgment and Decree to have the court enter an order awarding a judgment over against Green Acres for indemnification as well as for attorneys' fees and costs incurred in defending against this action and pursuing its cross-claim against Green Acres. Specifically, Navalco asked that the Conclusions of Law be amended as follows:

Defendant, Navalco of Utah, should have judgment against Defendant, Green Acres of America, Inc., in the amounts provided in paragraph 1 hereinabove [setting forth the judgment awarded to plaintiffs as against Navalco] together with its costs of Court and such reasonable attorney's fees as are awarded against Navalco of Utah. In the event that said parties fail to settle the claims for attorney's fees by Navalco of Utah against Green Acres of America, Inc.

for its expense in defending this action, then a reasonable attorney's fees should be awarded and determined in accordance with paragraph 5 hereinabove [granting Interiors Contracting, Inc. and Action Fire Sprinkler Company a reasonable attorney's fee from Navalco, the exact amount reserved for a later determination].

(R. 838-841, Motion to Amend Findings of Fact, Conclusions of Law and Judgment and Decree). The only issues argued to the district court was whether or not the settlement agreement was to be enforced or whether or not there had been a waiver of the cross-claim. Mr. Hatch filed an affidavit in support of that motion to which reference has been made above. No argument was had on the merits as Judge Durham indicated that if she found that Navalco still had a viable claim, she would request that counsel argue the merits of the claim.

While the Motion to Amend the Findings of Fact, Conclusions of Law and Judgment and Decree was under consideration by Judge Durham, Navalco brought a Motion for New Trial on the cross-claim of Navalco against Green Acres. That motion was denied by virtue of Judge Durham's ruling that Navalco waived its cross-claim against Green Acres. (R. 993, Order and Judgment).

#### ARGUMENT

##### I.

BASED UPON THE REPRESENTATIONS AND ACTIONS OF COUNSEL AT TRIAL IT WAS NOT ERROR FOR JUDGE WINDER TO NOT RULE ON THE CROSS-CLAIM OF NAVALCO.

It is the position of Navalco that because its cross-claim against Green Acres was set forth in its initial pleadings and subsequently in its trial brief, it was error for Judge Winder to fail to rule on that cross-claim despite the representations to Judge Winder at trial that a settlement had been reached between Green Acres and Navalco. A review of the circumstances surrounding the absence of a ruling from Judge Winder on the cross-claim will show that both Navalco and Green Acres had represented to the Court that there was no need for consideration by the court of that cross-claim; thus it was not error for Judge Winder to not rule on the cross-claim.

Navalco states at page 13 of its brief that the cross-claim of Navalco against Green Acres was set forth in the original pleadings filed by Navalco and further it was set forth in Navalco's trial memorandum (R. 715, Memorandum of Defendant, Navalco of Utah). Respondent does not dispute this statement by Navalco. Navalco goes on to argue that because it was its intention to rely on a lease agreement between Navalco and Green Acres for purposes of arguing the cross-claim, and because the lease was made an exhibit in the trial of the claim pending between plaintiffs Interiors Contracting, Inc. and Action Fire Sprinkler, and Navalco, there was no reason for Navalco to affirmatively argue or otherwise raise the cross-claim at trial before Judge Winder. Navalco further goes on to state that once judgment was awarded in favor of the plaintiffs and against Navalco, Judge Winder had a "duty to then rule upon the Cross Complaint."

The argument of Navalco has a serious omission. Specifically, Navalco fails to point out to the court that at the close of the case between plaintiffs and Navalco, Mr. Hatch asked the court that he be excused inasmuch as he had no further matters pending before the court. The relevant portion of the transcript reads as follows:

MR. HATCH: Assuming we now rest, are you going to take arguments now or try the other parts of the case?

THE COURT: Well, I think we better take arguments all at one time, if you don't mind. Let's try the case because otherwise - well, of course, we have all got to be here for the whole thing. I am wondering if there isn't some way - at least, Mr. Anderson could leave at this point.

MR. HATCH: I think both Mr. Anderson and myself could leave because we have Summary Judgments on all of the others here. Judge Durham granted us a Summary Judgment as to all of the defendants, the other defendants.

(R. 1232).

The court then inquired as to whether or not anyone had any objections to Mr. Hatch and Mr. Anderson leaving. Although there were no objections, Ms. Polich explained to the court that there had been a cross-claim pending between Navalco and Green Acres, but the matter no longer required the decision of the court. Specifically, that portion of the transcript reads as follows:

THE COURT: Well, does anyone have any objection to Mr. Hatch and Mr. Anderson leaving or can you think of any reason why they ought to be required to remain at this point?

MS. POLICH: No. I just wanted to have - there is a cross-claim pending between Navalco and Green Acres, but we have reached a tentative settlement. So for your information, there will be nothing on that.

THE COURT: Let me refer to the bottom of your Memorandum, Ms. Polich, where you talk about these cases. Of course, that was typed before my ruling this morning on Gray's Electric. So it -- the only claims that do remain are Mr. Lincoln, Mr. Tohara and Mr. Tohara against Green Acres and the one we just heard and then Gray's Electric against Green Acres. Is that it?

MS. POLICH: That is correct.

(R. 1232-1233).

It is significant to note that Mr. Hatch at no time disagreed with Ms. Polich's statement that a settlement had been reached between Navalco and Green Acres and that the court need not consider the claim. Also, when the court, in insuring that it understood all the claims before it for consideration, explicitly identified each of the claims it intended to consider and did not include the cross-claim of Navalco, Mr. Hatch said nothing. If it was the intention of Mr. Hatch that Judge Winder rule on the claim between Navalco and Green Acres, he certainly did not evidence that to the court.

Subsequently, the closing argument was had on the claim between Interiors Contracting, Inc. and Action Fire Sprinkler Company and Navalco. At the close of argument, Mr. Hatch asked if he might be dismissed. The court responded that "Mr. Hatch and Mr. Anderson and their clients may be excused." (R. 1254). No closing arguments were had on the cross-claim between Navalco and Green Acres of America.



Given that a representation was made to Judge Winder that a settlement agreement had been reached between Navalco and Green Acres, coupled with Mr. Hatch's acquiescence in the court's identification of the claims still pending before him, which identification did not include the cross-claim between Green Acres and Navalco, it was not error for Judge Winder to not rule on the cross-claim pending between Navalco and Green Acres. The circumstances of the case clearly establish that it could not have been the intent of Navalco to receive a ruling by Judge Winder on the cross-claim.

## II.

IT WAS NOT ERROR FOR JUDGE DURHAM TO FIND THAT NAVALCO HAD WAIVED IT CROSS-CLAIM FOR FAILURE TO PRESENT THE CLAIM AT TRIAL.

The record of the case clearly demonstrates that Navalco neither presented its cross-claim against Green Acres at trial nor reserved the claim for resolution at a later time; therefore, Judge Durham properly denied Navalco's Motion to Amend Findings of Facts, Conclusions of Law and Judgment and Decree on the basis that Navalco waived its cross-claim against Green Acres.

Judge Durham, in ruling on Navalco's Motion to Amend Findings of Fact, Conclusions of Law and Judgment and Decree, correctly stated the law and applied it to its facts of the instant case as is evidenced in her Memorandum Opinion dated April 23, 1980. (R. 988-989). The relevant portion of that Memorandum Opinion reads as follows:

1. Navalco's Motion to Amend is denied. The transcript of the trial shows that Navalco waived its cross-claim against Green Acres by failing to submit it to the court for ruling at the time of trial, and by not objecting when opposing counsel indicated to the court that it was settled and did not require a ruling. There was nothing to prevent its litigation at trial, and it was nowhere specifically reserved. Therefore, the general rule that issues which could have been raised may not be thereafter litigated is applicable, and res judicata principles govern. The fact that the chances of succeeding on the cross-claim look better after trial than they did before and during does not give rise to a right to belatedly raise a claim that could have been disposed of at trial, but was not because of the acquiescence of counsel.

(R. 988).

It is clearly the law in Utah that unless a claim is explicitly reserved for determination at a later time, all claims pending before the trial court are to be resolved at the time of trial. Clegg v. Lee, 30 Utah 2d 242, 248, 516 P.2d 348 (1973).

Orderly procedure requires that a party must present his entire case and his theory or theories to the trial court, and he cannot thereafter urge a different theory in an attempt to prolong litigation. [Footnote omitted.]

If this were not the rule of law, it would be possible for cases to be tried piecemeal as the losing party found elements which it had previously failed to litigate.

This Court explicitly ruled in Upton v. Heiselt, 118 Utah 573, 223 P.2d 428 (1950) that where a party can present an issue at trial but chooses not to do so, the issue is waived and cannot

subsequently be revived. In Upton a pre-trial order allowed the defendant to introduce evidence establishing that the tax deeds involved in the suit were invalid. The court ruled that failure of the defendant to introduce the evidence constituted waiver of that issue and therefore, defendants were precluded from raising it before the Supreme Court.

It may be that, under the pre-trial order as framed, the defendants could have proceeded to introduce evidence establishing that the tax deeds were invalid. They did not, however, choose to do so, and thus waived this issue in the trial court, and may not now raise it before this court.

223 P.2d at 430.

And in Amoss v. Bennion, 30 Utah 2d 312, 517 P.2d 1008 (1973) the Court affirmed the district court's dismissal of appellant's claim when appellant elected not to go forward with a new trial. The appellant had been contending that the setting aside of the jury verdict and granting a new trial was error and therefore chose not to proceed with a new trial of the issues. The court noted that the issue was not "reserved for future consideration by stipulation of the parties and the decree of the court entered therein is res adjudicata." 517 P.2d at 1010.

A review of the record shows that Judge Durham was correct in finding that Navalco neither presented the claim at trial nor reserved the claim for later determination by the court. Specifically, this finding is supported by the following facts which have been extensively detailed above.

1. Mr. Hatch acquiesced in the statement of counsel for Green Acres that the cross-claim of Navalco against Green Acres had been settled.

2. When Judge Winder indicated those claims still pending before him and did not indicate that the cross-claim of Navalco as against Green Acres was still pending before him, Mr. Hatch again acquiesced in the statement, having said nothing.

3. No evidence was put on at trial, nor was any closing argument had on the Navalco cross-claim.

4. The transcript established that there was no explicit reservation of the claim for a later determination by the court.

It further appears from the record that Mr. Hatch simply did not even consider the possibility of a judgment against Navalco for the total amount of work performed by plaintiffs, Action Fire Sprinkler Company and Interiors Contracting, Inc. As Mr. Hatch states in his affidavit:

Affiant indicated to Ms. Polich that in his opinion Defendant's reimbursement should be based upon services through the granting of summary judgment against all other Defendants, but that since Affiant assumed that the only issue involving Navalco remaining in the case was in the nature of an estoppel question as between Navalco and the Plaintiffs resulting from certain conversations between the Plaintiffs and Navalco's agents that [sic] Affiant did not assume reimbursement would be required for this.

(R. 979-980). The fact that Mr. Hatch assumed and relied on his belief that Navalco could be found liable only for that portion of

the work performed by the lien claimants as a result of reliance upon Navalco's assurances of payment is clearly evidenced by the fact that Navalco sought only reimbursement by Green Acres of those attorneys' fees incurred through the bringing of its Motion for Summary Judgment. (R. 979). But it simply makes no sense that Mr. Hatch would initially take the position that Green Acres was not liable for any of the attorneys' fees incurred in Navalco going to trial because it was Navalco's own actions which caused the claims to continue to trial, and then later argue that the cross-claim between Navalco and Green Acres was still viable and before the trial court with respect to indemnification by Green Acres of Navalco.

It appears that Mr. Hatch was so certain that Navalco could be held responsible for only a small portion of the work done by the lien claimants (that which was induced by reliance upon Navalco's statements) that he did not see any reason to present the cross-claim to the court. However, the underlying reason for Mr. Hatch not presenting the cross-claim does not change the fact that the cross-claim was neither presented to the trial court nor reserved. Mr. Hatch, by second guessing what Judge Winder would rule and by choosing not to put on his claim took a risk that his failure to put on the claim would cause its waiver. Very simply put, Mr. Hatch took the risk and lost. And in accordance with the law of this jurisdiction as set forth in Upton v. Heiselt, 118 Utah 573, 223 P.2d 428 (1950) and Amoss v. Bennion, 30 Utah 2d 312, 517 P.2d 1008 (1973), under such circumstances Navalco waived its claim.

Lastly, appellant states at page 14 of its brief that because the Navalco/Green Acres' lease was before the court, there was no need to argue the cross-claim to Judge Winder. Respondent finds it interesting that appellant believes that Green Acres would waive any and all right to argue the matter before the court, if not put on evidence with respect thereto. Respondent had taken a very active role throughout the litigation and would have, under no circumstances, forfeited the right to argue its position on the cross-claim to the trial court.

Inasmuch as it was the actions and acquiescence of Mr. Hatch that caused Judge Winder to not rule on the cross-claim between Navalco and Green Acres, it would be unfair and burdensome to now reopen the cross-claim and require that Green Acres continue to litigate this matter. Inasmuch as the outcome of the indemnification claim is known, settlement would now be straightjacketed in a way unlike prior to trial of the claim. That is, any chance of Green Acres to realize a true compromise settlement is destroyed because the liability of Navalco will be known. Navalco chose the manner and timing in which it desired to pursue its cross-claim against Green Acres and it should be held responsible thereto.

Given the above, it is clear that Mr. Hatch did not believe Green Acres was liable for any of the work done by Action Fire Sprinkler Company and Interiors Contracting, Inc. as a result of their reliance on Navalco; therefore, inasmuch as Mr. Hatch did not believe there was any possibility, whatsoever, of an adverse

ruling with respect to the remainder of those lien claims, it follows that he did not believe that a ruling by Judge Winder on the cross-claim was necessary. The resulting conclusion must be that the claim was neither presented at trial nor reserved; therefore, the finding of Judge Durham that Navalco waived its cross-claim should be affirmed by this Court.

CONCLUSION

Given the above, it is clear that Navalco waived its cross-claim for indemnification and attorneys' fees against Green Acres. Therefore, the denial by Judge Durham of appellant's Motion to Amend Findings of Facts, Conclusions of Law and Judgment and Decree and the subsequent denial of appellant's Motion for New Trial should be affirmed by this court.

Respectfully subitted this 15th day of September, 1980.



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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 1980, I delivered two true and correct copies of the foregoing Brief of Respondent to Glen Hatch, Haslam & Hatch, 80 West Broadway, Salt Lake City, Utah, 84101.

