

2011

GDE Construction Inc v. Dianne W. Leavitt : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GDE CONSTRUCTION, INC Plaintiff/Appellant, v. DIANNE W. LEAVITT, et al. Defendants/Appellees.	BRIEF OF APPELLANT Appellate Court Docket No. 20110128
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APPEAL FROM JUDGMENT OF
THE FOURTH DISTRICT COURT, UTAH COUNTY,
THE HONORABLE STEVEN HANSEN

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STATEMENT OF JURISDICTION

Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, the District Court certified as final the orders appealed from. Appellate jurisdiction is conferred upon the Utah Court of Appeals pursuant to Rule 5(a) of the Utah Rules of Appellate Procedure and Utah Code § 78A-4-103.

STATEMENT OF RELEVANT FACTS

1. In August 2006, Lorin and Dianne Leavitt ("Leavitts") contracted with GDE Construction, Inc. ("GDE") to perform certain remodeling work on their home and property. (R405; First Amended Verified Complaint, 2)
2. The terms of the agreement were that the Leavitts would pay GDE on a cost plus basis, paying for GDE's costs and 15% for profit and overhead. (R405)
3. The Leavitts contend that the 15% included labor to be performed by GDE. (R405) GDE contends that labor was to be billed separately. (R560)
4. GDE began work on the project in October 2006. (R1084)

5. By the beginning of 2007, the Leavitts had requested substantially more work than originally contemplated and the cost of the project increased.

(R1084)

6. In February 2007, the Leavitts obtained a construction loan from Bank of American Fork ("BAF") in the amount of \$1,137,000 ("First Construction Loan").

(R1102)

7. As a condition of approving the loan, BAF required that GDE sign as guarantor a "Guaranty of Completion and Performance" dated February 9, 2007. GDE signed the guaranty. (R1102)

8. BAF approved the First Construction Loan and disbursed the loan proceeds to GDE, as requested, during the next several months. (R1102)

9. Between February and October 2007, the cost and scope of the project increased again, and the proceeds from the First Construction Loan ran out.

(R1084)

10. In or about October 2007, Lorin Leavitt met with GDE's principals, Don and Amy Eldredge to discuss the status of the project and how to proceed. (R1084)

11. The topics and outcome of the meeting are disputed. GDE contends that the Leavitts agreed to pay just over \$1 million to complete the project, with \$600,000 to be financed by BAF, \$150,000 to be paid in cash immediately, and the remaining \$250,000 to be paid once the project was completed and permanent financing was in place. (R2025) The Leavitts contend that GDE agreed to complete the project for \$600,000, with the same cash payments. (R1084)

12. In December 2007, BAF approved an additional construction loan in the amount of \$600,000. (R1102)

13. As a condition of approving the second construction loan, BAF requested that GDE sign and identical "Guaranty of Completion and Performance" as the first construction loan. GDE signed the document. (R1102)

14. On March 18, 2008, because GDE had not been fully paid for its work on the Project, Amy Eldredge recorded on the Leavitt home a "Notice of Mechanic's Lien" in the principal amount of \$140,000 ("First Lien"). (R2025, 2029)

15. In its First Lien GDE claims it "furnished the first labor, materials and/or equipment on October 10, 2006 and furnished the last labor, materials and/or equipment on April 30, 2008." (R1084)

16. After GDE recorded the First Lien, the Leavitts informed GDE that the lien was preventing them from obtaining permanent financing on the property. As evidence of this fact, the Leavitts presented GDE with a letter from CityWide Home Loans indicating that the lien was preventing them from obtaining permanent financing. (R2029)

17. Four days after the Leavitts informed GDE that the First Lien was preventing them from obtaining permanent financing, GDE presented the Leavitts with a "Promissory Note with Confession of Judgment (Secured by Trust Deed against Real Property)" ("GDE Note"). (R1084) The GDE Note was secured by a trust deed recorded against certain property owned by the Leavitts, however, GDE's trust deed was superseded by previously-recorded interests on that property such that the property had no equity with which to pay GDE's trust deed. (R2025)

18. Even though the note stated that GDE received payment of \$10,000 as consideration, no money was exchanged between GDE and the Leavitts. (R560)

19. Additionally, GDE contends that it never expected the Leavitts to make payment on the GDE Note, but rather, expected that it would be paid from the permanent financing facilitated by the release of the First Lien. (R2025) The Leavitts contend that GDE expected the GDE Note to be paid, but do not dispute that no money changed hands. (R560)

20. After receiving the GDE Note, GDE released the First Lien, recording a release of lien. (R560) No payment was ever made on the note. (R560)

21. On June 25, 2008, GDE recorded on the Leavitt home a new "Notice of Mechanic's Lien" for the GDE Debt in the same principal amount of \$150,000, which amount included the \$140,000 principal amount previously claimed in its First Lien (the "Second Lien"). (R560)

22. In the Second Lien, GDE claimed the same dates of service it previously claimed in the First Lien. (R1102)

23. GDE did not perform any new work on the Project from the time of recording of the First Lien to the time of recording the Second Lien. (R1102)

24. The Leavitts and BAF contend that Amy Eldredge recorded the Second Lien on the Leavitt home because the GDE Note, secured by the GDE Trust Deed, was not paid. (R1102)

25. GDE contends that it recorded the Second Lien because no payment was made toward the balance due to GDE for the work performed on the project. (R2029)

26. On July 16, 2008, GDE further recorded on the Leavitt home an "Amended Lien to Suupercede [sic] Lien Recorded on June 25, 2008, Utah County Recorder Number 73098:2008" in the principal amount of \$563,690.45 ("Amended Lien"). GDE amended the lien to include the total amount due on the project, including amounts owed to subcontractors. Some of the subcontractors asserted claims for breach of contract against GDE, and GDE disclaimed any obligation to pay those subcontractors in those respective actions. (R1102)

27. On August 18, 2008, a Notice of Default and Election to Sell ("Notice of Default") for the GDE

Trust Deed was recorded on the St. George Property.

(R560)

28. Also on August 18, 2008, GDE filed the instant action naming Ms. Leavitt, BAF and other lien claimants as defendants. (R12)

29. In its First Amended Complaint filed November 6, 2008 ("Amended Complaint"), GDE brought claims for, as against Mrs. Leavitt, (1) breach of contract, (2) quantum meruit/contract implied in fact, (3) quantum meruit/contract implied in law, each in the total principal amount of \$563,690.23, and, as against all parties, (4) to foreclose its Amended Lien, with a deficiency judgment as against Mrs. Leavitt for any resulting deficiency following foreclosure of its Amended Lien. (R20)

30. The Leavitts filed a counterclaim, and additionally sought a temporary restraining order preventing GDE from proceeding to foreclosure on the property secured by the GDE Note on the basis that it was fraudulently entered into and enforced. (R104, R359, R405)

31. The parties conducted discovery, including taking the depositions of the principals of GDE and the Leavitts.

32. After discovery closed, the Leavitts filed a motion for summary judgment asserting that the GDE Note constituted an accord and satisfaction and that GDE's claims must be dismissed and requesting 54(b) certification of whatever order the trial court entered. (R1084)

33. BAF also filed a motion for summary judgment, duplicating many of Leavitts arguments, and additionally asserting that the Guaranties require GDE to release its lien claims and settle the other lien claims on the project. (R1102)

34. GDE opposed the Leavitts' motion on several bases: 1) that the GDE Note was void under the doctrine of mutual mistake because both parties believed that release of the lien would lead to permanent financing, and it did not; 2) that there was no accord and satisfaction; and 3) that the release of the First Lien was invalid because no payment was made. (R2025) GDE

submitted a declaration of Amy Eldredge in opposition to the motion. (R2029)

35. GDE opposed BAF's motion, reiterating its defenses from its opposition to the Leavitts' motion, and also asserting that the Guaranties are unenforceable under Utah's Mechanic's Lien Statute. (Utah Code § 38-1-1, et seq.) (R1929)

36. BAF and the Leavitts filed motions to strike the affirmative defense of mutual mistake as it was not adequately pled and to strike the Declaration of Amy Eldredge, arguing that paragraph 5 of the Declaration contradicted her prior deposition testimony and relied on inadmissible hearsay within hearsay. (R 2059, 2126) The offending statement is, "I was told by the Leavitts that the only condition precedent to the granting of a loan by Citywide Home Loans was the release of the First Lien." (R2029)

37. GDE opposed the motion to strike the affirmative defense, relying on the following language from GDE's answer to the Leavitt's Amended Verified Complaint: "GDE specifically pleads the defenses of estoppel, failure of consideration, fraud, illegality,

laches, license, payment, release, statute of frauds, and any other matter constituting an avoidance or affirmative defense as may be disclosed through discovery." (Emphasis added.) Alternatively, GDE requested that it be granted leave to amend its answer under Rule 15 of the Utah Rules of Civil Procedure. Finally, GDE opposed the motion to strike the Declaration of Amy Eldredge, arguing that there was no inconsistency and that the testimony did not rely on hearsay within hearsay. (R2166, 2181)

38. After the parties fully briefed the motions, the Court held oral argument which substantially followed the briefing. On October 26, 2010, the Court issued a written ruling granting in part the motions to strike and granting BAF and the Leavitts' motions for summary judgment. (R2230) The ruling was later reduced to two written orders to which GDE objected, and BAF and the Leavitts replied. (R2288, 2285, 2305, 2344) These orders contained language certifying them as final under Rule 54(b). (R2321, 2391) BAF did not object to these orders.

39. The Order on the motions to strike was entered on November 29, 2010, and the Order on the motions for summary judgment was entered on December 9, 2010.

(2321, 2391)

40. GDE filed a request for reconsideration or clarification on November 26, 2010, which was fully briefed. (R2313) The Court denied GDE's request for reconsideration on January 4, 2011. (R2471)

41. BAF, the Leavitts, and a subcontractor who had entered into a settlement agreement with GDE (Noorda Architectural Metals, Inc.) immediately began collection and enforcement actions against GDE.

42. On January 28, 2011, GDE filed a motion to set aside the judgments, request for 54(b) certification, and for an extension of time to file a notice of appeal. (R2534)

43. On February 1, 2011, GDE filed a notice of appeal. (R2577)

44. On February 7, 2011, before the parties had fully briefed GDE's motion, the Court granted GDE's request for 54(b) certification and for an extension of time to file a notice of appeal. (R2624)

45. Collection actions proceeded before the District Court until March 15, 2011, when Judge Hansen ordered a stay of all proceedings pending the outcome of the appeal. (R3341)

46. BAF filed a motion for summary disposition of this appeal, arguing that: 1) the notice of appeal was untimely; 2) that GDE's docketing statement was deficient; and 3) that the orders appealed from were improperly certified under Rule 54(b). In an Order filed April 26, 2011, this Court denied BAF's motion as to the first two grounds on the merits, and deferred consideration of the certification issue.

SUMMARY OF THE ARGUMENTS

I. Jurisdiction

BAF argues that these Orders were improperly certified under Rule 54(b) of the Utah Rules of Civil Procedure. The proposed orders submitted jointly by BAF and the Leavitts included language certifying them as final under Rule 54(b), and BAF did not object at that time and has waived that argument.

However, in the event this Court reaches the merits of that issue, GDE asserts that the three

elements required for proper interlocutory certification are met: 1) there must be multiple claims for relief or multiple parties to the action; 2) the decision would be final as to the claim on which it is rendered; and 3) there is no just reason for delay. Here, all three elements are met: there are at least three remaining parties in this litigation; the decisions rendered by the Court fully dispose of the claims on which they were rendered; and there is no just reason for delay. Indeed, BAF itself seems to believe that the Order is final, as it has begun collection actions against GDE, which could not be commenced absent a final order.

II. Motions to Strike

A. Paragraph 5 of the Eldredge Declaration is admissible.

The trial court struck Paragraph 5 on the basis that it contains hearsay within hearsay. However, first level of hearsay - the statement by CityWide - is not being offered for the truth of the matter, but only for the effect on the listener. The second level of

hearsay - the statement by the Leavitts - is a party admission under Rule 801(d)(2).

B. The affirmative defense of mutual mistake was adequately pled. Alternatively, the trial court erred in failing to grant GDE leave to amend its answer to include mutual mistake.

GDE's catchall statement adequately incorporated mutual mistake. Alternatively, because the trial had not commenced, and because the assertion of the defense of mutual mistake would not have necessitated additional discovery, the trial court erred in failing to grant GDE leave to amend its complaint, either expressly or impliedly by consent of the parties.

III. The parties did not reach an accord and satisfaction.

The three elements of accord and satisfaction are: 1) the amount is unliquidated and disputed; 2) payment is made on the amount; 3) that the creditor accept payment as satisfaction of the debt. In this case, none of the three elements are met. First, GDE alleged that the amount was undisputed, as discussed by the parties during the October meeting. Second, the promissory note was never intended by the parties to be payment of any kind as evidenced by the lack of a

\$10,000 down payment and no collection under the note. Furthermore, the note could not serve as payment unless honored. Third, GDE never accepted the note as payment in full.

IV. The Guaranties of Completion are unenforceable under Utah's Mechanic's Lien Statute.

The First Guaranty of Completion was executed in February 2007, before the enactment of § 38-1-39, and is thus expressly invalid and contrary to Utah's Mechanic's lien law (See § 38-1-29) as held by this Court in *Olsen v. Chase*, 2011 UT App 181.

The Second Guaranty of Completion, executed in December 2007, is also invalid as it runs afoul of the above-stated provision forbidding any private attempts to change the nature of lien rights except as expressly provided for in the Code. Additionally, it fails to comply with the requirements of Utah Code § 38-1-39, which requires that all lien releases and waivers conform to a certain format and be founded upon payment of the amount due. Because GDE did not receive payment for its execution of the Second Guaranty, nor does it comply with the form required by Section 39, the Second Guaranty is unenforceable.

STANDARD OF REVIEW

The question of 54(b) certification is a jurisdictional question that is reviewed by this Court at its own discretion. *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 18, 44 P.3d 663. The issue of proper certification is a question of law reviewed for correctness. *Kennecott Corp. v. Utah State Tax Comm'n*, 814 P.2d 1099, 1100 (Utah 1991).

Because this matter comes before the Court on competing motions for summary judgment, all factual inferences are taken in the light most favorable to the nonmoving party - Appellant GDE. "An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600.

ARGUMENT

GDE argues that jurisdiction is proper in this Court as the Orders were properly certified and BAF waived any argument in opposition to their

certification by failing to file any objection to the Orders.

On the merits, GDE appeals three issues: 1) whether the trial court properly struck the defense of mutual mistake and portions of the Declaration of Amy Eldredge; 2) whether the trial court properly found that there was an accord and satisfaction between the Leavitts and GDE; and 3) whether the trial court properly ruled that the First and Second Guaranties are enforceable against GDE.

I. THE ORDERS APPEALED FROM ARE PROPERLY BEFORE THIS COURT.

This Court has jurisdiction to hear all appeals from final orders. This jurisdiction extends to orders that are certified as final under Rule 54(b) of the Utah Rules of Civil Procedure. For 54(b) certification to be proper, only three elements need be met: 1) there must be multiple claims for relief or multiple parties to the action; 2) the decision would be final as to the claim on which it is rendered; and 3) there is no just reason for delay. *Powell v. Cannon*, 179 P.3d 799, 807 (Utah 2008).

Here, all three requirements are met. The claims which are the subject of this appeal are the Leavitt's defense to all of GDE's claims on the basis of accord and satisfaction (the trial court dismissed GDE's complaint as a result), BAF's breach of contract claim under the guaranty (which was granted in its entirety), and the subsequent awards of attorneys' fees as a result of the previous orders. These orders fully dispose of the various claims to which they pertain, leaving the remainder of the case intact. This matter is ripe for appeal.

II. THE TRIAL COURT ERRED IN GRANTING THE MOTIONS TO STRIKE THE DEFENSE OF MUTUAL MISTAKE AND THE DECLARATION OF AMY ELDREDGE.

A. THE TRIAL COURT ERRED IN STRIKING PARAGRAPH 5 OF THE ELDREDGE DECLARATION.

In response to BAF and the Leavitts' motions for summary judgment, GDE filed an opposition that included a declaration of Amy Eldredge, a principal of GDE. In the declaration, Amy sought to clarify what the Leavitts had argued regarding the effect of the CityWide letter. Amy stated: "I was told by the Leavitts that the only condition precedent to the

granting of a loan by Citywide Home Loans was the release of the First Lien."

BAF and the Leavitts filed motions to strike this statement on the basis that it contained hearsay within hearsay and was inadmissible. The consideration of evidentiary objections is a matter left to the discretion of the trial court. Here, the trial court improperly granted the motion. Rule 805 of the Utah Rules of Evidence forbids the use of hearsay within hearsay. To be admissible, a statement must either not be hearsay or fall into one of the exceptions of the hearsay rule.

The first level of hearsay here is the statement by CityWide to the Leavitts that the lien was a bar to permanent financing. This statement is not being offered for the truth of the matter - to wit, whether the CityWide would actually fund the loan if the lien was released, but rather, for the effect on the listener, i.e. whether or not the Leavitts and GDE believed that CityWide would fund the loan if the lien was removed. Whether or not CityWide would actually

comply with the letter is immaterial for hearsay purposes.

The second level of hearsay is the statement by the Leavitts to GDE, restating the CityWide letter. However, the statement is not hearsay. Rule 801(d)(2) of the Utah Rules of Evidence states that a statement is not hearsay if: "the statement is offered against a party and is (A) the party's own statement..." Because the Leavitts are a party and it is their own statement, it is not hearsay and the trial court erred in ruling that it was. Accordingly, GDE respectfully requests that this Court reverse the trial court's ruling and order that the statement be admitted into the record.

B. THE TRIAL COURT ERRED IN STRIKING THE DEFENSE OF MUTUAL MISTAKE.

In both its Verified Answer and its Answer to the First Amended Complaint of Lorin and Dianne Leavitt, GDE included the following language, "GDE specifically pleads the defenses of estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, statute of frauds, and any other matter constituting an avoidance or affirmative defense as may be disclosed through discovery." As discovery

progressed, GDE was able to piece together the evidence showing that the parties believed that the long-term financing would go through and pay GDE's general contractor fee. These facts were established through the various depositions, including the depositions of Don and Amy Eldredge which were conducted near the close of discovery. Now that the facts supporting GDE's mutual mistake argument have been developed, GDE's "catchall" defense is triggered, including mutual mistake. Additionally, GDE is entitled to amend its pleadings to include the affirmative defense of mutual mistake. Rule 15 of the Utah Rules of Civil Procedure states:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

Rule 15 has been interpreted to include the affirmative defense of mutual mistake of fact. Opposing counsel correctly cites *Mabey v. Kay Peterson Const. Co., Inc.*,

682 P.2d 287 (1984) in support of the Leavitts' position that mutual mistake must be affirmatively pled. However, as the court points out when discussing mutual mistake in *Mabey*, "It is true that when issues not raised by the pleadings are tried by express or implied consent they shall be treated in all respects as if they had been raised in the pleadings." *Id.* at 289. Accordingly, to the extent necessary, GDE affirmatively requests that the Court grant leave to amend its pleadings to include the affirmative defense of mutual mistake.

There is ample cause in this case to allow the amendment. The Leavitts' argument that the promissory note constituted an accord and satisfaction had not been previously raised. Accordingly, GDE could not have anticipated this argument (at least in the form appearing in their motion for summary judgment), and thus GDE should be allowed to raise the affirmative defense of mutual mistake. Furthermore, there is no prejudice to the Leavitts. The facts surrounding mutual mistake have already been developed and there is no need for further discovery. GDE respectfully

requests that this Court reverse the trial court's decision to strike the defense of mutual mistake and allow the issue to go to trial.

III. THE TRIAL COURT ERRED IN RULING THAT GDE'S CLAIM WAS SATISFIED BY AN ACCORD AND SATISFACTION.

The elements of accord and satisfaction are: 1) that the amount is unliquidated and disputed; 2) that payment is made in satisfaction of the debt; and 3) that the creditor accept the payment as full satisfaction. *Smith v. Grand Canyon Expeditions Co.*, 84 P.3d 1154, 1158 (Utah 2003). However, the undisputed facts of this case show that none of the three elements were met.

The amount at issue here is liquidated and undisputed. The dispute, to the extent there was on at the time of execution of the Promissory Note and Trust Deedk, involved how the payment to the subcontractors would be made. Leavitts felt it necessary to have GDE release its lien so they could pay the amount owing on the project. The GDE Note served only to facilitate permanent financing and was never meant to be payment. If the Leavitts had paid the amount stated in the note,

which corresponded with the amount stated in GDE's First Lien, then the lien would have been released and no further action would have been required.

Additionally, because the Leavitts never paid the down payment of \$10,000, and because they never paid anything else under the Note, it is clear from the evidence that it was never meant to be enforceable.

More importantly is the fact that the Leavitts have expressly disclaimed any obligation to pay under the Note, and indeed, sought a temporary restraining order preventing GDE's action to foreclose. Because this is a motion for summary judgment, all facts must be taken in the light most favorable to GDE. While it may seem contradictory for GDE to rely on a fact that a note it holds may not be enforceable, that is the conclusion that must be drawn by this judge overseeing this case in this court. Because the Leavitts disclaim any obligation to pay under the Note, claiming that it was fraudulently entered into, then the trial court should have concluded that the Note is unenforceable and that GDE's version of the facts is correct: the Note was never intended to be payment and thus could

not have release GDE's mechanic's lien and contract claims.

IV. THE GUARANTIES OF COMPLETION ARE UNENFORCEABLE UNDER UTAH'S MECHANIC'S LIEN STATUTE.

BAF's main argument is that GDE is bound by the two documents entitled "Guaranty of Completion and Performance" which were signed by GDE contemporaneously with BAF's approval of the Leavitts' two construction loans. In its motion, BAF seeks to enforce the indemnification and subordination language of the Guaranty, which is as follows:

GUARANTY: Guarantor hereby unconditionally and absolutely warrants and guarantees to Lender that:... (c) except for Lender's security agreements, the Project will be constructed and completed free and clear of all liens and encumbrances, including without limitation all mechanics' liens, materialman's liens and equitable liens; ...

BAF seeks enforcement of this provision through specific performance as well as an award of attorneys' fees associated with this action.

A. CURRENT UTAH LAW REQUIRES THAT SUBORDINATION AGREEMENTS BE ACCOMPANIED BY PAYMENT TO BE ENFORCEABLE.

After the trial court ruled on this motion, and before this brief was drafted, this Court issued its decision in *Olsen v. Chase*, 2011 UT App 181. In *Olsen*,

this Court held that subordination agreements executed prior to March 31, 2007 (the effective date of Utah Code § 38-1-39) are prohibited by statute and unenforceable. *Id.* at ¶ 14. This Court did not rule on what requirements must be met for a subordination agreement to be valid if executed after that date.¹ GDE maintains that such agreements must comply with the express requirements of Section 39, including requiring that any change in lien rights be accompanied by payment for service rendered.

BAF cites to the Utah Court of Appeals' decision in *Ellsworth Paulsen Construction Co. V. 51-SPR, LLC*, 144 P.3d 261 (Ut. Ct. App. 2006), *aff'd*, 183 P.3d 248 (Utah 2008). In *Ellsworth*, a property owner contracted with a general contractor to build two office buildings. The property owner entered into a separate agreement with an investor to obtain financing for the

¹ GDE notes that the Utah State Legislature in the Spring 2011 General Session passed a number of changes to the Mechanic's Lien law, including a provision that brings the statute in harmony with this Court's ruling in *Olsen* and GDE's interpretation of the statute. The new changes (Utah Code § 38-1-1, *et seq.* 2011) now expressly provide that a construction lender must buy out the priority of a senior lienholder in order to maintain a lien right.

project. At intervals during the project, general contractor would submit invoices to the lender for payment. The lender would then pay those invoices when the general contractor signed an attached waiver of lien and indemnification which contains language which is substantially similar to the language of the Guaranty at issue in this case. At some point during the project, the property owner began diverting funds away from the project and began to get behind in paying the general contractor. Despite not being paid, the general contractor continued working for some time until the owner disappeared. At that point, the general contractor learned of the involvement of the investor and sought payment directly from them. The investor refused payment and the general contractor filed a lien against the project and sought foreclosure.

The investor asserted the defense of waiver of lien and indemnification against claims made by subcontractors (which had been paid separately by investor) based on the various agreements signed by the general contractor as it was paid. The trial court

ruled that the lien waivers were valid, but refused to apply the guaranty and indemnification language. Both parties appealed.²

The Court of Appeals held that the lien waivers were valid and enforceable, finding that when the general contractor signed the waivers, it was agreeing to the express guaranty language included in those agreements. The Court stated, "Likewise, when the guaranty and warranty language of the lien waiver provisions is properly construed **in the context of the lien waiver agreement**, those provisions are valid and enforceable." *Id.* at 273 (emphasis added).

It is clear from this ruling that a guaranty and warranty provision is only enforceable if it is given in conjunction with payment. ("Here, as part of the valid lien waiver provisions, the applicability of the indemnity and guaranty language hinges on the relevant draw dates for each check, as is so with the specific lien waiver language itself." *Id.* at 273.) Thus, if the general contractor has not been paid, then it

²There were several other issues in the case including joint venture which are not relevant to this argument.

cannot be bound to indemnify the lender against non-payment to other parties.

This holding is in perfect harmony with Utah's mechanic's lien statute. The statute, which is to be construed so as to protect the contractor's right to lien (*Bailey v. Call*, 767 P.2d 138, 140 (Utah App. 1989)), clearly states that a lien waiver cannot be enforced unless it is given after the lien right has arisen and in conjunction with payment of the amount waived or released. See U.C.A. § 38-1-39.

BAF would have this Court hold the opposite, that a contractor can be bound to pay its subcontractors or even other materialman with whom it has no contract, even if the general contractor has not been paid by the owner. This result is contrary to the longstanding practice of obtaining lien waivers in conjunction with progress payments which has been upheld by the courts and codified by the state legislature.

Here, it is undisputed that GDE has not been paid any money for the amounts claimed by the various other lienholders, nor has any party contended that GDE has retained funds paid to it which should have been

disbursed to its subcontractors or any entity who performed work on the project. Therefore, GDE cannot be bound by the language of the guaranty until it has been paid. BAF's action to enforce the guaranty is premature and should not be sustained.

B. THE GUARANTY OF COMPLETION AND PERFORMANCE IS NOT BINDING ON GDE.

In addition to the reasons stated above, the Guaranty cannot be enforced against GDE at this point because it fails to meet even the most basic contract principles. Foremost among these, is the lack of consideration between the parties. In the cases cited by BAF, the extension of credit is sufficient consideration for the guaranty agreements to be enforceable. However, as explained above, in each of those cases, the guarantor was a principal of the borrower. In this case, GDE has no relationship with the Leavitts beyond the construction contract. If for some reason the Leavitts fail to pay on the construction contract, GDE still has a right to recovery against the Leavitts. In the cases described above, an investor has no right to recovery against his company if the company fails to turn a profit. Thus,

the investor only receives the benefit of the loan if the company succeeds. Here, GDE is entitled to be paid independent of whether or not that money comes from BAF or some other source. Thus, there is no consideration between BAF and GDE.

Furthermore, the agreement is completely one-sided. If BAF is successful, it gets the entire benefit of the agreement, while GDE gets nothing from BAF. This is made clear by the express language of the agreement which states, "As a condition and inducement to making the Loan, Borrower has requested that Guarantor duly execute and deliver this Guaranty...which [is] considered by Lender to be material regarding Lender's decision to make the loan." The benefit of the agreement flows from BAF to the Leavitts through BAF's decision to make the loan, but BAF has no obligation to pay GDE unless the Leavitts approve the payments. Indeed, if both the Leavitts and BAF are successful on their claims, BAF will have obtained the benefit of a lien-free project, the Leavitts will have obtained the benefit of GDE's work, and GDE will be left with the burden of paying all of

the subcontractors and other lien claimants. Such an outcome is contrary to principles of equity and justice and the trial court's decision should be reversed.

C. THERE ARE MATERIAL DISPUTES OF FACT WHICH PRECLUDE GRANTING BAF'S MOTION FOR SUMMARY JUDGMENT.

Underlying BAF's argument in many places is the contention that GDE disclaims any contract with several of the contractors included in the Amended Lien, as well as the other contractor parties to this case. This arrangement which arises due to the nature of the construction industry, necessarily implicates the intervention of a factfinder. If GDE is correct, the Leavitts are responsible for payment of the amounts owed to those contractors. If the Leavitts and BAF are correct, then GDE is responsible to pay those subcontractors. However, BAF's argument relies on both versions of the facts being true: that GDE is responsible to pay off the other contractor liens, but also that GDE has no right to lien for that work. This paradox cannot be resolved unless there is a factual determination regarding the respective obligations of the parties, which as clearly outlined in both the statement of facts above and in the statement of facts

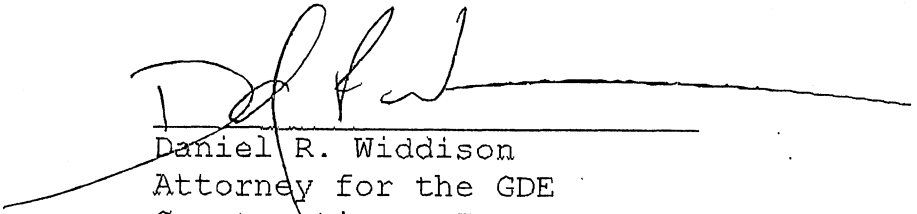
in GDE's response to the Leavitts' motion for summary judgment, are heavily disputed by the testimony of the parties. Therefore, summary judgment is inappropriate at this time and the trial court's decision should be reversed.

CONCLUSION

In light of the facts and arguments set forth above, GDE respectfully requests that this Court reverse the trial court's grant of summary judgment in favor of the Leavitts and BAF, reverse the trial court's order striking the defense of mutual mistake and paragraph 5 of the Eldredge Declaration, and remand this matter for trial on the merits.

DATED this 19th day of October, 2011.

TESCH LAW OFFICES, P.C.



Daniel R. Widdison
Attorney for the GDE
Construction, Inc.

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DATED this 19th day of October, 2011.

TESCH LAW OFFICES, P.C.

Daniel R. Widdison
Attorney for the GDE
Construction , Inc.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief for Appellant, to be sent by United States Mail, postage prepaid, on this _____ day of October 2011, as follows:

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[1](#) Mechanics' Liens[Section](#)
[29](#) No waiver of rights -- Exception -- Payment applied first to preconstruction service lien.**38-1-29. No waiver of rights -- Exception -- Payment applied first to preconstruction service lien.**

(1) (a) A right or privilege under this chapter may not be waived or limited by contract.

(b) A provision of a contract purporting to waive or limit a right or privilege under this chapter is void.

(2) Notwithstanding Subsection (1), a claimant may waive or limit, in whole or in part, a lien right under this chapter in consideration of payment as provided in Section [38-1-39](#).

(3) Unless an agreement waiving or limiting a lien right expressly provides that a payment is required to be applied to a specific lien, mortgage, or encumbrance, a payment to a person claiming or included within a preconstruction service lien and a construction service lien shall be applied first to the preconstruction service lien until paid in full.

Repealed and Re-enacted by Chapter 339, 2011 General Session

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[1](#) Mechanics' Liens[Section](#)
[39](#) Waiver or impairment of a lien right -- Forms -- Scope.**38-1-39. Waiver or impairment of a lien right -- Forms -- Scope.**

(1) As used in this section:

(a) "Check" means a payment instrument on a depository institution including:

(i) a check;

(ii) a draft;

(iii) an order; or

(iv) other instrument.

(b) "Depository institution" is as defined in Section [7-1-103](#).

(c) "Lien claimant" means a person that claims a lien under this chapter.

(d) "Receives payment" means, in the case of a restrictive endorsement, a payee has endorsed a check and the check is presented to and paid by the depository institution on which it is drawn.

(2) Notwithstanding Section [38-1-29](#), a written consent given by a lien claimant that waives or limits the lien claimant's lien rights is enforceable only if the lien claimant:

(a) (i) executes a waiver and release that is signed by the lien claimant or the lien claimant's authorized agent; or

(ii) for a restrictive endorsement on a check, includes a restrictive endorsement on a check that is:

(A) signed by the lien claimant or the lien claimant's authorized agent; and

(B) in substantially the same form set forth in Subsection (4)(d); and

(b) receives payment of the amount identified in the waiver and release or check that includes the restrictive endorsement:

(i) including payment by a joint payee check; and

(ii) for a progress payment, only to the extent of the payment.

(3) (a) Notwithstanding the language of a waiver and release described in Subsection (2), Subsection (3)(b) applies if:

(i) the payment given in exchange for any waiver and release of lien is made by check; and

(ii) the check fails to clear the depository institution on which it is drawn for any reason.

(b) If the conditions of Subsection (3)(a) are met:

(i) the waiver and release described in Subsection (3)(a) is null, void, and of no legal effect; and

(ii) the following will not be affected by the lien claimant's execution of the waiver and release:

(A) any lien;

(B) any lien right;

(C) any bond right;

(D) any contract right; or

(E) any other right to recover payment afforded to the lien claimant in law or equity.

(4) (a) A waiver and release given by a lien claimant meets the requirements of this section if it is in substantially the form provided in this Subsection (4) for the circumstance provided in this Subsection (4).

(b) A waiver and release may be in substantially the following form if the lien claimant is required to execute a waiver and release in exchange for or to induce the payment of a progress billing:

"UTAH CONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT"

Property Name: _____

Property Location: _____

Undersigned's Customer: _____

Invoice/Payment Application Number: _____

Payment Amount: _____

Payment Period: _____

To the extent provided below, this document becomes effective to release and the undersigned is considered to waive any notice of lien or right under Utah Code Ann., Title 38, Chapter 1, Mechanics' Liens, or any bond right under Utah Code Ann., Title 14, Contractors' Bonds, or Section 63G-6-505 related to payment rights the undersigned has on the above described Property once:

- (1) the undersigned endorses a check in the above referenced Payment Amount payable to the undersigned; and
- (2) the check is paid by the depository institution on which it is drawn.

This waiver and release applies to a progress payment for the work, materials, equipment, or a combination of work, materials, and equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount. This waiver and release does not apply to any retention withheld; any items, modifications, or changes pending approval; disputed items and claims; or items furnished or invoiced after the Payment Period.

The undersigned warrants that the undersigned either has already paid or will use the money the undersigned receives from this progress payment promptly to pay in full all the undersigned's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or combination of work, materials, and equipment that are the subject of this waiver and release.

Dated: _____

_____(Company Name)

By: _____

Its: _____"

(c) A waiver and release may be in substantially the following form if the lien claimant is required to execute a waiver and release in exchange for or to induce the payment of a final billing:

"UTAH WAIVER AND RELEASE UPON FINAL PAYMENT

Property Name: _____

Property Location: _____

Undersigned's Customer: _____

Invoice/Payment Application Number: _____

Payment Amount: _____

To the extent provided below, this document becomes effective to release and the undersigned is considered to waive any notice of lien or right under Utah Code Ann., Title 38, Chapter 1, Mechanics' Liens, or any bond right under Utah Code Ann., Title 14, Contractors' Bonds, or Section 63G-6-505 related to payment rights the undersigned has on the above described Property once:

- (1) the undersigned endorses a check in the above referenced Payment Amount payable to the undersigned; and
- (2) the check is paid by the depository institution on which it is drawn.

This waiver and release applies to the final payment for the work, materials, equipment, or combination of work, materials, and equipment furnished by the undersigned to the Property or to the Undersigned's Customer.

The undersigned warrants that the undersigned either has already paid or will use the money the undersigned receives from the final payment promptly to pay in full all the undersigned's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or combination of work, materials, and equipment that are the subject of this waiver and release.

Dated: _____

_____(Company Name)

By: _____

Its: _____"

(d) A restrictive endorsement placed on a check to effectuate a waiver and release described in this Subsection (4) meets the requirements of this section if it is in substantially the following form:

"This check is a progress/ final payment for property described on this check sufficient for identification. Endorsement of this check is an acknowledgment by the endorser that the waiver and release to which the payment applies is effective to the extent provided in Utah Code Ann. Subsection 38-1-39(4)(b) or (c) respectively."

(e) (i) If using a restrictive endorsement under Subsection (4)(d), the person preparing the check shall indicate whether the check is for a progress payment or a final payment by circling the word "progress" if the check is for a progress payment, or the word "final" if the check is for a final payment.

(ii) If a restrictive endorsement does not indicate whether the check is for a progress payment or a final payment, it is considered to be for a progress payment.

(5) (a) If the conditions of Subsection (5)(b) are met, this section does not affect the enforcement of:

- (i) an accord and satisfaction regarding a bona fide dispute; or
 - (ii) an agreement made in settlement of an action pending in any court or arbitration.
- (b) Pursuant to Subsection (5)(a), this section does not affect enforcement of an accord and satisfaction or settlement described in Subsection (5)(a) if the accord and satisfaction or settlement:
- (i) is in a writing signed by the lien claimant; and
 - (ii) specifically references the lien rights waived or impaired.

Amended by Chapter 382, 2008 General Session

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Judiciary and Judicial Administration

[78A](#)[Chapter](#)[4](#)

Court of Appeals

[Section](#)[103](#)

Court of Appeals jurisdiction.

78A-4-103. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire, and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section [63G-3-602](#);

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

Amended by Chapter 344, 2009 General Session

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