

1990

# James Constructors, Inc v. Salt Lake City Corporation : Plaintiff's Petition for Writ of Certiorari

Utah Supreme Court

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DOCKET NO. 900102

BRIEF

IN THE SUPREME COURT OF UTAH

JAMES CONSTRUCTORS, INC.  
Plaintiff and Petitioner,

v.

SALT LAKE CITY CORPORATION,  
Defendant and Respondent.

Petition No. 900102

-----  
SALT LAKE CITY CORPORATION,  
a municipal corporation of the  
State of Utah,

Plaintiff,  
v.

JAMES CONSTRUCTORS, INC., a  
Nevada Corporation; HOOD  
CORPORATION, a California  
corporation; and INDUSTRIAL  
INDEMNITY COMPANY, a California  
corporation,

Defendants.

PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI

Petition for Review of Decision of Utah Court of Appeals  
Affirming Summary Judgment of Third District  
Court of Salt Lake County

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**FILED**

MAR 9 1990

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF UTAH

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JAMES CONSTRUCTORS, INC.	)	
	)	
Plaintiff and Petitioner,	)	
	)	
v.	)	
	)	
SALT LAKE CITY CORPORATION,	)	
	)	
Defendant and Respondent.	)	Petition No. _____
	)	

---

SALT LAKE CITY CORPORATION,	)	
a municipal corporation of the	)	
State of Utah,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
JAMES CONSTRUCTORS, INC., a	)	
Nevada Corporation; HOOD	)	
CORPORATION, a California	)	
corporation; and INDUSTRIAL	)	
INDEMNITY COMPANY, a California	)	
corporation,	)	
	)	
Defendants.	)	

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PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF UTAH

---

JAMES CONSTRUCTORS, INC.	)	
	)	
Plaintiff and Petitioner,	)	
	)	
v.	)	
	)	
SALT LAKE CITY CORPORATION,	)	
	)	
Defendant and Respondent.	)	Petition No. _____
	)	
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Nevada Corporation, HOOD	)	
CORPORATION, a California	)	
corporation; and INDUSTRIAL	)	
INDEMNITY COMPANY, a California	)	
corporation,	)	
	)	
Defendants.	)	

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PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI

QUESTIONS FOR REVIEW

1. Whether the Court of Appeals by failing to address or rule upon plaintiff's primary point on appeal, i.e., that Salt Lake City had totally breached a construction contract, was such a departure from the usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

2. Whether the decision of the Court of Appeals, insofar as it held that plaintiff was bound by specific provisions of

a construction contract, was in conflict with decisions of this court.

#### REPORTS OF DECISIONS

The opinion of the Court of Appeals has not been reported. The opinion states that it is "not for publication."

#### JURISDICTIONAL GROUNDS

(A) The Utah Court of Appeals decision sought to be reviewed was entered on January 19, 1990.

(B) An order of the Utah Court of Appeals denying rehearing was entered on February 15, 1990.

(C) The statutory authority for exercise of jurisdiction is 78-2-2(5), Utah Code Annotated 1953, as amended.

#### CONTROLLING LAWS

There are no constitutional provisions, statutes, ordinances, or regulations involved in this case.

#### STATEMENT OF THE CASE

##### Nature of the Case

Petitioner, James Constructors, Inc. ("James"), sued Salt Lake City Corporation ("the City") for damages incurred as a result of the City's having required James to do work beyond that required by a construction contract, and for the City's wrongful termination of James's right to continue performance.

Under the contract, James was to excavate for, and place bedding, a pipe and backfill in, a trench running from

about 500 South and 1560 East, Salt Lake City, to 3200 South and 3400 East. The City supplied the pipe.

Course of Proceedings Below

In its verified complaint filed May 15, 1984, James set out a number of contract breaches by the City that caused damages to the pipeline, the City's failure to pay amounts earned, and its wrongful exclusion of James from the jobsite. The demand was for a finding that the City "wrongfully terminated" the contract, for certain specified damages, and for general relief.

After extensive discovery, including more than a dozen depositions, the City moved for summary judgment dismissing James's complaint with prejudice on the ground that under the terms of the contract, James was required to select and provide bedding and backfill materials satisfactory for completion of the project, and that it was not entitled to any recovery for any delays, down time or other hindrances, for extra work or lost profits (R.617). The motion was based on the pleadings, depositions, answers to interrogatories and admissions filed in the case and an affidavit not relevant to the issues in this petition. With its memorandum opposing summary judgment, James submitted a copy of the construction contract, a counteraffidavit, excerpts from nine depositions with exhibits to the depositions, including a report of the City's soil engineers, Dames & Moore (R.733), and the minutes of a prebid conference held by the City (R.767).



The motion for summary judgment was argued orally on April 11, 1988, following which the court issued a memorandum decision granting the city's motion (R.828-835). The court stated that the contract was clear and unambiguous and that, as a matter of law, James was not entitled to any recovery. The court relied on contractual provisions relating to delays, damages, orders for extra work and extras. Multiple parties and issues being involved as a result of a consolidation of two cases, on May 17, 1988, the court entered an order pursuant to Rule 54(b), U.R.Civ.P., in which it expressly determined that there was no just reason for delay and directed entry of a final judgment (R.962-963).

The findings of fact and conclusions of law and the order of partial summary judgment dismissing the action with prejudice were entered on June 1, 1988 (R.972, 976), and on June 21, 1988, James filed its notice of appeal to this court (R.996). The case was thereafter referred to the Utah Court of Appeals for decision pursuant to Rule 4A(a), R. Utah S.Ct.

Before the Utah Court of Appeals, James argued that under the terms of the contract, the City had a duty to select materials to be used for bedding and backfill under and around the pipe, and to determine whether the specified degree of compaction had been reached. James asserted that inasmuch as the City had those duties but failed to perform them, and terminated James's right to proceed further with the contract, the City had

totally breached the contract, and James was entitled to reliance damages or the reasonable value of the labor and materials furnished for the project.

In affirming the summary judgment, the Court of Appeals did not discuss whether the City had duties with respect to bedding, backfill, and compaction, or whether there had been a total breach of the contract by the City. James petitioned for rehearing, pointing out the court's failure to rule on a threshold question. On February 15, 1990, the rehearing was denied without opinion.

#### Statement of Facts

James and the City entered into a contract for construction of a pipeline, James agreeing to dig a trench, place and compact bedding material in the trench, lay pipe upon the bedding material, and place backfill material around and upon the pipe, compacting the material as it proceeded.

During construction, one of the problems encountered was whether material excavated from the trench, or that imported from another source, should be used as bedding or backfill in certain runs of the trench. Throughout the contract, the City insisted on James's using the excavated material (R. 656). On several occasions James requested that the City use imported material, but the requests were denied in all but three instances on the ground that the City believed the excavated material to be satisfactory (R. 656). Compaction tests were run by the City

each 200 feet, and the city inspector was satisfied that the compaction requirements were met (R. 657). The engineer who drafted the technical provisions of the contract calculated that 25,000 cubic yards of backfill and 2,000 cubic yards of bedding material would have to be imported, this estimate being based on a soil report prepared for the City by soils engineers prior to the letting of the contract (R. 657).

During construction of the pipeline, James was notified by the City of "excessive settlement of the trench" (R. 515). Demands were made upon James to repair the trench at its own expense in order to correct the excessive settlement, and to do it within the time established by the City. On or about April 16, 1984, the City notified James that it was terminating its right to proceed further because it did not correct the work as demanded (R. 515).

Prior to termination of the contract, James had submitted to the City a number of claims for extras and for work not contemplated by the contract (R. 573-609). The City denied all of the claims and sought to recover from James for its costs in reworking the trench.

The contract between James and the City was a fairly typical construction contract for a public project, containing myriad provisions, many of them in seeming conflict with others. It was not a contract in which the owners specified the results to be obtained, but one in which the contractor was required to

use the methods and materials set out by the owner in detail, through drawings and specifications and instructions.

The City's contract contained specific provisions with respect to bedding and backfill, of which technical provision § 201.03(c)(1) set out the bedding material requirements:

\* \* \* Trenches shall be over-excavated 6 inches below the bottom of the pipe or as directed by the Engineer. The trench shall be refilled to the grade at the bottom of the pipe with either selected granular material obtained from the excavation, sand, or crushed rock, at the option of the Engineer. When crushed rock bedding is ordered, the material shall be well-graded material of the 1-1/2 inch maximum size or as required by the Engineer. \* \* \* [Emphasis added.]

With respect to material for backfilling the trench, technical provision § 201.04(c) provided:

(1) Pipeline trenches shall be backfilled to a level 6 inches above the top of the pipe with selected material obtained from the excavation. If, in the engineer's opinion, said material is unsuitable for backfill purposes, imported material having a sand equivalent value of not less than 20 shall be used for this portion of the trench backfill. This granular material shall pass a 3 inch square sieve and shall not contain more than 15% of material passing a 200-mesh sieve and shall be of such a character as to permit water to pass through it quickly. Imported select backfill shall be included in payment for installation of the pipe. \* \* \* [Emphasis added.]

The contract documents also contained line items for bids on imported bedding and imported backfill, and technical provision § 195.02 required payment for imported bedding and backfill as follows:

(dd) IMPORTED BEDDING (Bid Item No. 41): Measurement and payment for imported bedding material, when

requested by the Engineer, shall be at the unit price bid per cubic yard. \* \* \* \*

(ee) IMPORTED BACKFILL (Bid Item No. 42): Measurement and payment for the imported backfill material, when requested by the Engineer, shall be at the unit price bid per cubic yard. \* \* \*

The City directed that the material taken from the excavation was to be used, and refused to permit the use of imported material unless James paid for it.

In addition to the provisions relating to the use of materials for bedding and backfill, the contract contains specific provisions with respect to compaction of the material.

Technical provisions § 201.06 provided:

Where backfill or bedding is required in the specifications to be compacted to a specified density, tests for compliance will be made by the Engineer, at the expense of the Owner, using ASTM T-180 Method D test procedures. Sufficient time shall be allotted the Engineer for performing the necessary control tests for an acceptance of the compacted layer before attempting to place new fill material. Any layer or portion thereof, that does not meet density requirements shall be reworked and recompactd until it meets the specified density requirements as determined by the Engineer. Additional tests made as a result of non-compliance shall be at the Contractor's expense.

General provision 3.08 of the contract provides that unless otherwise specified, testing or work for determining compliance shall be performed by the City or its authorized representative, and section 3.01 of the general provision contains the following:

Inspections and tests made at any point other than the point of incorporation in the work in no way will be considered as a guarantee of acceptance of such

material, or of a continued acceptance of material presumed to be similar to that upon which such inspections and tests have been made.

There was a dispute as to whether evidence outside the contract could be considered in fixing obligations with respect to selection of material and accomplishment of necessary compaction. The minutes of a prebid meeting conducted by the City on June 2, 1983 (R. 767), state that the meeting was held to explain "where the project is and explain any details that should be brought to the Contractor's attention"; general provision 1.13 defines the "work or project" to be all the work specified or contemplated in the contract to construct the improvements, including all alterations, amendments or extensions thereto made by extra work order or other written orders of the Engineer; general provision 2.01 provides that the Engineer shall decide all questions which may arise as to the quality or acceptability of materials furnished and work performed; general provision 2.04 provides that if the work to be done or any matters relative thereto are not sufficiently detailed, "the Contractor shall apply to the Engineer for such further explanations as may be necessary \* \* \* and contractor shall conform to them as part of the contract"; general provision 2.05 provides that any order given to the Contractor by the Engineer will be in writing; general provision 2.07(e) provides that the Contractor shall obey and follow every order or direction which shall be given by the Engineer or Engineer's designated representative in accordance

with the terms of the contract; general provision 2.15 relating to manufactured articles provides that they will be conditioned in accordance with the manufacturer's printed directions "unless specified in writing to the contrary by the Engineer."

In holding that James was not entitled to any recovery, the Court of Appeals relied upon contractual provisions that no extra work would be performed or paid for without a written order and that the contractor would repair all damages to the work. With respect to James's claims that it was the City's responsibility to select bedding and backfill materials and to determine whether compaction was accomplished to the required degree -- and consequently whether the City totally breached the contract by terminating James's rights under it -- the Court of Appeals said:

Contractor relies upon provisions of the contract pertaining to such things as the process of selecting backfill material and City's right to inspect the project. These provisions do not affect those set out above. Under the unambiguous wording of the parties' agreement, Contractor was not entitled to recover any of the damages Contractor claimed in its complaint.

#### ARGUMENT

##### I.

The Court of Appeals decided the case without addressing the primary issues before it, and this court should exercise its supervisory power.

Paragraph 16 of James's complaint referred to the City's requiring it to correct the work, and averred that work was unsatisfactory because of the City's failure to properly test

soils and to authorize James to use imported bedding and backfill materials. Paragraph 23 averred that the City had wrongfully excluded James from the jobsite. Paragraph 21 averred that the City's termination of the contract was unjustified and wrongfully done. The demand for judgment included a demand for an order that the City wrongfully terminated the contract.

Although the averments do not use the term "total breach," they do set out what, in law, constitutes a total breach of the contract, which should be sufficient "notice pleading."

In addition to the complaint, James's memorandum to the trial court in opposition to the motion for summary judgment, raised the total breach question. It was argued that responsibility for selection of bedding and backfill was placed on the City by the terms of the contract (R. 658); that the City was responsible for any failure due to insufficiency of the bedding and backfill used (R. 660); that James was entitled to rely upon the results of the City's compaction tests (R. 662); that James was entitled to rescission of its contract and to compensation in quantum meruit for services performed (R. 666); that James was entitled to payment for extra work, claims alleged in its complaint under a theory of quantum meruit (R. 668); and that the action of the City constituted a repudiation of the contract (R. 669). All of this was pointed out to the Court of Appeals in James's reply brief.



In James's opening brief to the Court of Appeals, the last paragraph prior to the conclusion stated:

If it were the City's duty to "select" bedding and backfill, or to test the compaction for compliance with the specifications, the City's removing of James from the job was a repudiation of the contract and constituted a total breach. James, therefore, would be entitled to recover either its damages, including lost profits, for breach of contract, damages based on its reliance interest, or the reasonable value of the benefit conferred. In determining reliance damages or the value of the benefit conferred, the court is not bound by contractual provisions as to extras and written orders. See Restatement 2d Contracts, §§ 345, 349, 371.

The decision of the Court of Appeals rejected this argument without otherwise dealing with it, saying:

Contractor relies upon provisions of the contract pertaining to such things as the process of selecting backfill material and City's right to inspect the project. These provisions do not affect those set out above. Under the unambiguous wording of the parties' agreement, contractor was not entitled to recover any of the damages contractor claimed in its complaint.

It is plain that the Court of Appeals did not consider or decide the question of whether there was a factual issue as to total breach of the contract by the City, even though total breach was the crux of James's appeal.

## II.

By holding that contractual provisions precluded recovery notwithstanding the City's total breach, the decision of the Court of Appeals was in conflict with decisions of this Court.

Although the opinion of the Court of Appeals is not clear, it appears to hold that even if there was a total breach, contractual provisions relating to delays, repairs, and other damages precluded recovery. On page 2 of its opinion, the court stated:

In its complaint, Contractor alleged that City had wrongfully terminated the parties' contract and that, as a result, Contractor had suffered the following damages: (a) \$427,601.23 for delays, construction sequence changes and standby time costs; (b) \$92,698.97 for repairs to the project, including repairs associated with the settlement and sinkholes in the trench and other items; and (c) \$6,542.88 for demobilization costs. The district court held that such claims were precluded under the clear language of the parties' contract. We agree.

But if the parties' contract was "wrongfully terminated," those provisions are not applicable. This court has recognized that where there is a total breach of contract, the non-breaching party may recover the reasonable value of the services performed, and reasonable value has nothing to do with the niceties of characterization.

In Wagstaff v. Remco, Inc., 540 P.2d 931, 933 (Utah 1975), an action by a subcontractor against a contractor for additional compensation after subcontractor had pulled off the

job because of a long delay in making an installment payment to him, the court said:

\* \* \* \* We think the principle is correct that where the failure to pay an installment as provided in a construction contract is such a substantial breach that it materially impairs the Contractor's ability to perform, he has the right to consider the contract at an end, to cease work, and to recover the value of the work already performed.

Darrel J. Didericksen & Sons v. Magna Water & Sewer Improvement District, 613 P.2d 1116, 1119 (Utah 1980), involved a construction project in which it was found that the contractor had justifiably ceased work on the project because of the failure of the owner to perform. With respect to damages, the court said:

On the matter of assessing damages, the evidence was deficient as to the cost of completion and therefore the court could not apply the formula of assessing damages on the total contract price less the price of completion. Under such circumstances, the court was justified in determining the damages on the basis of the contract price, or on the reasonable value, of the portion of the project already completed and not paid for.

The above-cited Utah cases are in accord with what is generally considered to be the rule with respect to total breach of contract. See 5 Corbin on Contracts, § 1104; Restatement 2d Contracts, §§ 243(2) and 373; and 2 Stein, Construction Law, ¶ 11.02[b].

James has not contended and does not contend that the Court of Appeals was required to find that there was a total breach of a contract; what it has contended and does contend is

that there was a genuine issue of material fact with respect to total breach, and summary judgment was not appropriate.

CONCLUSION

The Court of Appeals failed to decide whether there was evidence from which a trial judge or jury could find that Salt Lake City had materially breached its contract with James.

The holding of the Court of Appeals to the effect that it makes no difference whether there was a total breach or not, and that in any event James was bound by specific contractual provisions, was at odds with the decisions of this court relating to the right of a contractor to recover reasonable value of work performed where there has been a total breach of contract.

The decision of the Court of Appeals should be reviewed and the case returned to the District Court for trial.

Respectfully submitted this 9<sup>th</sup> day of March 1990.

Bryce E. Roe (Signed)

---

Bryce E. Roe  
FABIAN & CLENDENIN  
A Professional Corporation  
Attorneys for Plaintiff and  
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 9<sup>th</sup> day of March 1990, I caused to be mailed, postage prepaid, four true and correct copies of the foregoing PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI, to:

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Stanford P. Fitts  
BEASLEY & FAIRCLOUGH  
300 Deseret Book Bldg.  
40 East South Temple Street  
Salt Lake City, Utah 84111  
Attorneys for Respondent

Bryce E. Roe (Signed)

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BER:022690B

## APPENDIX A

759

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Dodge

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

FILED

JAMES CONSTRUCTORS, INC., )  
a Nevada corporation, )  
Plaintiff, )  
vs. )  
SALT LAKE CITY CORPORATION, )  
a municipal corporation of )  
the State of Utah, )  
Defendant. )

VERIFIED COMPLAINT

0842857

Civil No.

COMES NOW plaintiff and for cause of action against  
defendant alleges as follows:

1. Plaintiff is a Nevada corporation with its  
principal place of business located in Salt Lake County.  
Plaintiff is qualified to do business within the State of Utah  
and is duly licensed and qualified to perform and furnish the  
construction services and work within the State of Utah which  
are the subject of this action.

2. Defendant is a municipal corporation of the  
State of Utah located in Salt Lake County.

3. The subject of this action is founded on  
contractual obligations and contractual rights. Accordingly,

immunity for suit is waived pursuant to §63-30-5, Utah Code Annotated.

4. On or about the 8 day of July, 1983, plaintiff entered into a contract with defendant for construction work on the project described as Big Cottonwood Conduit Extension Terminal/Park Transmission Pipeline, Project No. 35-4184.

5. A copy of the contract and Addendums 1 and 2 entered into between plaintiff and defendant are attached as Exhibit "A" and made a part hereof.

6. By Addendum No. 1 to the contract, the defendant elected to furnish a majority of the materials for the project. However, it was plaintiff's responsibility to furnish bedding material and import backfill material only when authorized to do so and requested to do so by defendant's engineer.

7. Defendant's engineer or other representatives were required to test the native soil removed from the pipeline trench to determine its suitability for bedding and backfilling purposes. Defendant was under a duty to inform plaintiff of the soil test results and failed to do so.

8. Pursuant to the contract, plaintiff was obligated to compact all bedding and backfill material to comply with standards set forth in the contract documents. Defendant's engineer or other representatives were required to test the compaction of the bedding and backfill to determine compliance with the contract specifications. Defendant was



under a duty to inform plaintiff of the compaction test results and failed to inform plaintiff of any deficiencies concerning compaction test results in a timely manner.

9. By failing to inform plaintiff of the soil test results and any negative compaction test results, plaintiff was misled as to the suitability of the bedding and backfill material used in the pipeline trench.

10. The defendant was under a duty to authorize the plaintiff to use bedding material and imported backfill material when native material would not meet contract specifications. Defendant breached this duty to plaintiff, resulting in certain areas of trench failure and possible damage to the pipe.

11. On the few occasions when defendant authorized the plaintiff to use imported bedding and backfill material, defendant has failed to pay for the use of the materials.

12. Plaintiff has performed the contract in a timely manner. In late 1983, work on the project was stopped by mutual agreement of the parties due to adverse weather conditions. Plaintiff requested to be allowed to resume construction in February 1984. Defendant has never authorized additional construction but only maintenance and repair of alleged deficiencies in previous construction.

13. The plaintiff submitted monthly invoices to the

defendant for payment for work performed in February, March and April of 1984. That for reasons unknown to the plaintiff defendant has failed and refused to pay said monthly invoices. The amount of said monthly invoices unpaid by defendant is \$65,865.39 plus retainage of \$50,000.00.

14. In March 1984 plaintiff submitted claims to defendant for payment for extra expenses caused by defendant's actions. The amount of the additional claim is \$526,843.08. Defendant has failed to pay this amount and has failed to negotiate plaintiff's claim in good faith.

15. After receiving the claim from plaintiff for additional compensation, defendant undertook a course of conduct which resulted in wrongfully terminating plaintiff's contract with defendant.

16. By letter dated March 26, 1984, a copy of which is attached as Exhibit "B", defendant invoked Paragraph 13 of the contract and demanded that plaintiff correct various items of work within 10 days or have the contract terminated. The majority of the rejected work is the result of defendant's failure to properly test soils and failure to authorize the plaintiff to use appropriate bedding and backfill materials.

17. Pursuant to the letter of March 26, 1984, plaintiff requested a meeting with appropriate representatives of defendant. The meeting was held March 28, 1984. In the meeting defendant requested plaintiff to submit a proposal for correction of the work rejected by defendant and a timetable

for making said repairs. Both parties agreed that it was impossible to correct all of the work allegedly rejected by defendant within 10 days.

18. Plaintiff submitted a letter to defendant dated March 29, 1984, a copy of which is attached as Exhibit "C" and made a part hereof. In said letter plaintiff proposed a method and timetable for repairing the rejected items. Plaintiff stated that the reason for the rejected work was due to the defendant's failure to authorize the use of proper materials. Plaintiff stated that it would consider part of this work as extra and submit claims for negotiation at a later time.

19. By letter dated April 3, 1984, and received by plaintiff April 6, 1984, a copy of which is attached as Exhibit "D" and made a part hereof, defendant once more invoked Paragraph 13 of the contract and demanded that plaintiff correct all rejected work regardless of fault or responsibility for the alleged deficiencies, within 10 days or have the contract terminated.

20. Plaintiff proceeded to correct as much of the rejected work as possible. Defendant undertook a course of action to delay and hinder plaintiff's efforts by failing to provide inspectors as required by the contract in a timely fashion.

21. Thereafter, by letter dated April 16, 1984, a copy of which is attached as Exhibit "E" and made a part

hereof, defendant terminated plaintiff's contract. The termination by defendant was unjustified and wrongfully done.

22. That the defendant has breached the contract in the following particulars:

- a) By failing to authorize the use of proper bedding material;
- b) By failing to authorize the use of imported backfill material;
- c) By engaging in a course of conduct which made performance by plaintiff impossible;
- d) By failing to authorize proper bedding and backfill material, damage to the pipe has resulted;
- e) By failing to pay monthly invoices in the amount of \$65,865.39 in a timely fashion;
- f) By failing to pay the claim of plaintiff in the amount of \$526,843.08 in a timely fashion;
- g) By failing to negotiate in good faith with plaintiff concerning payment of claims.

23. That the defendant has wrongfully excluded the plaintiff from the job site and will not permit the plaintiff to take soil samples from the subject premises. The defendant has proceeded to dig up and remove the bedding and backfill material without permitting plaintiff to inspect and test the same. That this action by defendant will unfairly prejudice plaintiff and cause immediate and irreparable damage to plaintiff by allowing the condition of the work site to be tampered

with before proper testing is done.

24. That plaintiff is in need of a temporary restraining order restraining defendant from not allowing plaintiff access to the work site to take appropriate soil samples for testing purposes. The taking of samples would not interfere with any of the work presently being done by defendant. Without said tests, plaintiff will be prejudiced at the time of trial of this matter.

25. That the temporary restraining order should be issued without notice to defendant prior to hearing plaintiff's motion for preliminary injunction.

26. That bond for the temporary restraining order should be waived inasmuch as the plaintiff has already posted a payment bond payable to the defendant in the sum of \$1,128,481.00. Said bond would cover payment of any sum by which defendant may be damaged by the granting of this temporary restraining order. A copy of the bond is attached as Exhibit "F" and made a part hereof.

WHEREFORE, plaintiff prays for judgment as follows:

1. For an order of the court finding that defendant wrongfully terminated plaintiff's contract with defendant.

2. For \$65,865.39 representing payment for monthly invoices submitted for February, March and April 1984 plus interest at the legal rate.

3. For \$526,843.08 representing payment for

claims submitted by plaintiff to defendant for extra work caused by defendant's actions during the course of the contract plus interest at the legal rate.

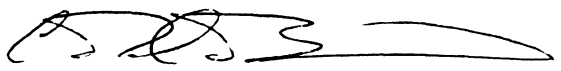
4. For a sum of money equal to plaintiff's lost profits for being wrongfully terminated from the contract and not being allowed to complete the contract.

5. For an award of attorney's fees incurred in this action, costs of court and other relief as seems appropriate.

6. For the issuance of a temporary restraining order and preliminary injunction permitting the plaintiff access to the job site for the purpose of taking soil samples for testing purposes prior to the defendant's changing and destroying the evidence.

7. For such other relief as the court deems just in the premises.

DATED this 15 day of May, 1984.

  
C. REED BROWN  
Attorney for Plaintiff

Plaintiff's address:

P. O. Box 25726  
Salt Lake City, Utah 84125

STATE OF UTAH            )  
                              ) ss.  
COUNTY OF SALT LAKE )

James Foreman, being first duly sworn, deposes and says that he is the president of plaintiff in the above

## APPENDIX B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

JAMES CONSTRUCTORS, INC.,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. C-84-2857
vs.	:	
SALT LAKE CITY CORPORATION,	:	
Defendant.	:	

---

SALT LAKE CITY CORPORATION, a	:	
municipal corporation of the	:	
State of Utah,	:	
Plaintiff,	:	
vs.	:	
JAMES CONSTRUCTORS, INC., a	:	
Nevada corporation, et al.,	:	
Defendants.	:	

-----

The above-entitled matter came on for the Court's consideration on the defendant, Salt Lake City Corporation's Motion for Partial Summary Judgment. The matter was set on the Court's Law and Motion calendar April 11, 1988. Salt Lake City Corporation was represented by Wilford A. Beesley and Stanford P. Fitts. Defendants James Constructors and Hood Corporation were represented by Jay E. Jensen and C. Reed Brown, and defendant Industrial Indemnity Company was represented by David Reeve. The



Court considered the Motions and accompanying Memoranda. heard the arguments of counsel, and based upon the foregoing renders this

MEMORANDUM DECISION

The undisputed facts are as follows:

1. On or about July 8, 1983, Salt Lake City Corporation and James Constructors entered into a contract for the construction of a water pipeline known as the Big Cottonwood Conduit Extension - Terminal Park Transmission Pipeline. The contract was number 35-4184.

2. While plaintiffs James Constructors, Inc. deny that their work was defective, there can be no dispute that defects were observed and demands for corrections were rendered by Salt Lake City Corporation.

3. In March and April of 1984 Salt Lake City Corporation notified James that it would terminate James from the project if the defects were not corrected within ten (10) days.

4. On April 16, 1984, Salt Lake City Corporation notified James of termination from the project.

5. James was paid in full by Salt Lake City Corporation for all written extra work orders issued on the project.

6. James claims it is now entitled to payment from Salt Lake City Corporation in the amount of \$526,843.08 for work it considers extra, consisting of delay damages, standby time damages, construction sequence changes and work repair defects in the project, and damages associated with each. The breakdown of these damages consists of the following:

a. \$427,601.23 claimed as extra work for delays, construction sequence changes, and standby time costs.

b. \$92,698.97 for repairs to the project, including repairs associated with settlement and sinkholes in the trench, and other items.

c. \$6,542.88 for demobilization costs relative to James' termination from the project.

d. An undetermined amount for lost profits to James.

7. James bases its extra work claim upon letters from James to Salt Lake City Corporation, dated March 7, 1984, March 16, 1984, April 16, 1984, and April 19, 1984.

8. James admits that the cost of completing the project, had James remained on the job, would involve speculation.

9. While James contests the suitability of the trench bedding and the responsibility for its selection, it is

undisputed that the bedding, for whatever reason, including the failure to appropriately cradle the pipeline, failed.

10. Salt Lake City Corporation claims that James Constructors, Inc. was not appropriately licensed, which is disputed by James Constructors, and appears to this Court to be an issue that could be verified through counsel, and if the license had been appropriately obtained but in a dba or an erroneous name, so long as it applied to the plaintiffs, should moot the issue and the Court will not consider the issue to be a substantive defect.

11. James Constructors stated certain additional facts which it claimed to be undisputed, and which Salt Lake City claimed were not germane to the issues involved in the present motions.

#### ISSUES AND RULING

1. Salt Lake City Corporation alleges that the contract requires James to select the bedding and backfill materials as necessary to comply with the requirements of the specifications of the contract. The Court finds that the language of the contract is unambiguous and clear in that section 3.01 of the contract provides, "The contractor shall furnish all materials required to complete the work. . . ." and in addendum 1, part 2,

section 195.01 the contract further states that "all materials. . . " would be provided by the owner, except for ". . . bedding, backfill, . . . ." Thus, James was clearly responsible for providing the appropriate bedding, whether native or import, to complete the project.

2. The obligation of James to construct the pipeline in conformance with the contract specifications was not modified, waived or relieved in any respect. James argues that the inspectors on the job site would not allow James to utilize import materials for the bedding, but indicated that the native materials were satisfactory. This Court finds that when James was responsible to "furnish materials and workmanship in accordance with the specifications" that James was responsible to see that the result was satisfactory and could not transfer to the inspector responsibility for the result if the inspector indicated that in his opinion native material was satisfactory and import was not necessary. If James disagreed, certainly the inspector would not object to the utilization of import material at James' request.

3. The contract specifically states in section 2.08 "The inspector shall in no case act as foreman or perform other duties for the contractor, nor interfere with the management of the work

by the latter. Any advice which the inspector may give the contractor shall not be construed as binding on the engineer in any way, or in any way releasing the contractor from fulfilling all of the terms of the contract."

Thus, the Court finds the contractor responsible for performing the work in a workmanlike manner and responsible for assuring the result as satisfactory.

4. The Court finds that James is not entitled under the contract or outside the contract for recovery of damages associated with construction sequence changes. In paragraph 5.06 of the contract it expressly provides, "The contractor shall not be entitled to any claim for damage on account of hindrance or delay from any cause whatsoever. . . . " The contractor has thus agreed not to be entitled to raise such claims.

5. James is further not entitled to payment for extra work, because section 6.02 of the contract states, "No extra work shall be performed or paid without a written order for such work." Thus, as section 2.10(c) of the contract states, ". . . any extra work done without written authority will be considered as unauthorized, and no payment will be made therefore." James has no basis for such claim.

6. James was obligated within the agreement to repair defects, including settlement of backfill, damages to utilities, and damaged pipe at its own expense. Thus, the \$92,698.97 for repairs requested by James are excluded by the contract. Section 4.08 of the contract states, "The contractor shall rebuild, repair and restore and make good all injuries or damages to any portion of the work occasioned by any of the above causes before final acceptance, and shall bear the expense thereof." Paragraph 2.10 specifically states that if the contractor is required to make such repairs, "no compensation will be allowed for such correction."

7. James is not entitled to any recovery for lost profits, because such are uncertain, contingent, conjectural and speculative in nature, and not allowed.

#### CONCLUSION

The Court therefore concludes that the Motion for Summary Judgment filed by Salt Lake City Corporation should be and the same is granted. Salt Lake City Corporation's counsel is instructed to prepare Findings of Fact, Conclusions of Law, and

JAMES V. SALT LAKE CITY

PAGE EIGHT

MEMORANDUM DECISION

Judgment consistent with this Memorandum Decision, and submit them to counsel in harmony with the Local Rules.

Dated this 13 day of April, 1988.

DS/  
DAVID S. YOUNG  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 14 day of April, 1988:

Wilford A. Beesley  
Stanford P. Fitts  
Attorneys for Salt Lake City Corporation  
40 E. South Temple, Suite 310  
Salt Lake City, Utah 84111

C. Reed Brown  
Attorney for James Const. & Hood Corp.  
3450 Highland Drive, Suite 301  
Salt Lake City, Utah 84106

Jay E. Jensen  
Elwood P. Powell  
Co-counsel for James Const. & Hood Corp.  
175 S. West Temple, Suite 510  
Salt Lake City, Utah 84101

David A. Reeve  
Attorney for Industrial Indemnity  
175 S. Main, Suite 1300  
Salt Lake City, Utah 84111

Max D. Wheeler  
David W. Slaughter  
Robert C. Keller  
10 Exchange Place, 11th Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145

C. P. Fitts



FILED 23

CLERK OF DISTRICT COURT  
SALT LAKE COUNTY  
JUN 1 1988

*C. Porter*

WILFORD A. BEESLEY #0257  
STANFORD P. FITTS #4834  
BEESLEY & FAIRCLOUGH  
Attorneys for Salt Lake City  
Corporation  
310 Deseret Book Building  
40 East South Temple Street  
Salt Lake City, Utah 84111  
Telephone: (801) 538-2100

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

---

JAMES CONSTRUCTORS, INC.,  
Plaintiff,

vs.

SALT LAKE CITY CORPORATION,  
Defendant.

---

SALT LAKE CITY CORPORATION,  
a municipal corporation of  
the State of Utah,

Plaintiff,

vs.

JAMES CONSTRUCTORS, INC.,  
a Nevada corporation, HOOD  
CORPORATION, a California  
corporation, and INDUSTRIAL  
INDEMNITY COMPANY, a  
California corporation,

Defendants.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Civil No. C-84-2857

Judge David S. Young

Judgment in the above-entitled matter came on regularly for the Court's consideration on April 11, 1988 at 10:00 a.m., the Honorable David S. Young presiding. Salt Lake City Corporation was represented by Wilford A. Beesley, Esq. and Stanford P. Fitts, Esq.. James Constructors, Inc. was represented by Jay E. Jensen, Esq. and C. Reed Brown, Esq.. Hood Corporation was represented by David Reeve, Esq.. Industrial Indemnity Company was represented by David W. Slaughter, Esq.. The Court having considered the Memoranda and Exhibits submitted by the parties, having heard the arguments of counsel, and being fully advised in the premises, hereby enters its Findings of Fact and Conclusions of Law as follows:

#### FINDINGS OF FACTS

1. On or about July 8, 1983, Salt Lake City Corporation and James Constructors, Inc. ("James") entered into a contract for the construction of a water pipeline known as the Big Cottonwood Conduit Extension - Terminal Park Transmission Pipeline. The contract was number 35-4184.

2. While plaintiffs James Constructors, Inc. denies that it is responsible for settlement of the trench, damage to the pipe, or other defects in the work, it is undisputed that defects were observed and demands for corrections were rendered by Salt Lake City Corporation.

3. In March and April of 1984 Salt Lake City Corporation

notified James that it would terminate James from the project if the defects were not corrected within ten (10) days.

4. On April 16, 1984, Salt Lake City Corporation notified James of termination from the project.

5. James was paid in full by Salt Lake City Corporation for all written extra work orders issued on the project. No written extra work orders exist for any of the extra work claimed by James in its Complaint.

6. In its Complaint, James claims, based upon letters from James to Salt Lake City Corporation, dated March 7, 1984, March 16, 1984, April 16, 1984, and April 19, 1984, that it is entitled to extra payment from Salt Lake City Corporation in the amount of \$526,843.08 for work consisting of delay damages, standby time, construction sequence changes and work repairing defects in the project, and damages associated with each. The breakdown of these damages consists of the following:

- a. \$427,601.23 claimed as extra work for delays, construction sequence changes, and standby time costs.
- b. \$92,698.97 for repairs to the project, including repairs associated with settlement and sinkholes in the trench, and other items.
- c. \$6,542.88 for demobilization costs relative to James' termination from the project.
- d. An undetermined amount for lost profits

to James.

7. James admits that the cost of completing the project, had James remained on the job would involve speculation.

8. While James contests the suitability of the native soils for trench bedding and backfill and the responsibility for its selection, it is undisputed that some of the bedding and backfill failed, for whatever reason.

#### CONCLUSIONS OF LAW

1. James Constructors, Inc. was required under the Contract with Salt Lake City Corporation to provide either select materials from native soils or to furnish proper import materials, at its own expense as part of its unit price per lineal foot of pipe installed, to achieve necessary compaction of the bedding and backfill for the pipe and to prevent settlement as required by the Specifications.

2. Inspection by Salt Lake City inspectors or any alleged failure to adequately inspect the work performed by James did not modify, waive, or relieve James Constructors, Inc. from constructing the pipeline in conformance with the Contract Specifications. Salt Lake City had no duty under the Contract to inspect the project for the benefit of James Constructors, Inc. and the occurrence, adequacy or extent of any inspection by SLCC is irrelevant and immaterial to any of the issues in the case.

3. James Constructors, Inc. was responsible under the Contract for performing the work in a workmanlike manner and responsible for assuring the result as satisfactory. Any advice which James Constructors, Inc. may have received from SLCC inspectors is not binding on the SLCC engineer in any way and does not in any way release James Constructors, Inc. from fulfilling all of the terms of the Contract.

4. The extra work claims in James Constructors, Inc.'s Complaint were not the subject of written extra work orders authorized by Salt Lake City Corporation as required by the Contract documents, and James Constructors, Inc. is not entitled to payment for extra work claims alleged in its Complaint.

5. James Constructors, Inc. is not entitled to any recovery under or outside the Contract for any delay damages, stand-by time, construction sequence changes or other hindrances, however caused, in the prosecution of the work.

6. The Contract between Salt Lake City Corporation and James Constructors, Inc. required James Constructors, Inc. to repair defects in the project, including settlement of bedding or backfill, damage to utilities, or damage to pipe, at its own expense and without any additional compensation from Salt Lake City Corporation.

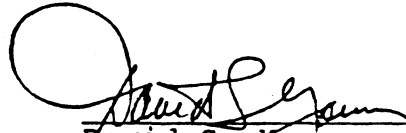
7. James Constructors, Inc. is not entitled to any recovery for lost profits.

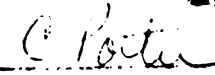
8. James Constructors, Inc.'s Complaint in this matter

should, as a matter of law, be dismissed with prejudice.

Dated this 1<sup>ST</sup> day of ~~May~~ <sup>June</sup>, 1988.

BY THE COURT:

  
\_\_\_\_\_  
David S. Young  
District Court Judge

  
\_\_\_\_\_  
C. Porter  
Deputy Clerk

CERTIFICATE OF SERVICE

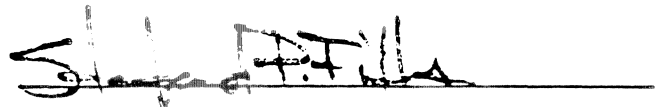
I certify that I caused a true and correct copy of the foregoing to be HAND DELIVERED to the following this 16<sup>th</sup> day of May, 1988:

C. Reed Brown, Esq.  
HINTZE & BROWN  
3450 Highland Drive, Suite 301  
Salt Lake City, Utah 84106

Jay Jensen, Esq.  
Elwood P. Powell, Esq.  
CHRISTENSEN, JENSEN & POWELL  
510 Clark Leaming Building  
175 South West Temple  
Salt Lake City, Utah 84101

David A. Reeve, Esq.  
ARMSTRONG, RAWLINGS & WEST  
1300 Walker Bank Building  
175 South Main Street  
Salt Lake City, Utah 84111

Max D. Wheeler, Esq.  
David W. Slaughter, Esq.  
Robert C. Keller, Esq.  
SNOW CHRISTENSEN & MARTINEAU  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145

A handwritten signature, likely "J. F. Filla", is written in dark ink over a horizontal line.

## APPENDIX D



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JUN 1 1988

C. F. Allen

WILFORD A. BEESLEY #0257  
STANFORD P. FITTS #4834  
BEESLEY & FAIRCLOUGH  
Attorneys for Salt Lake City  
Corporation  
310 Deseret Book Building  
40 East South Temple Street  
Salt Lake City, Utah 84111  
Telephone: (801) 538-2100

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

---

JAMES CONSTRUCTORS, INC.,

Plaintiff,

vs.

SALT LAKE CITY CORPORATION,

Defendant.

---

SALT LAKE CITY CORPORATION,  
a municipal corporation of  
the State of Utah,

Plaintiff,

vs.

JAMES CONSTRUCTORS, INC.,  
a Nevada corporation, HOOD  
CORPORATION, a California  
corporation, and INDUSTRIAL  
INDEMNITY COMPANY, a  
California corporation,

Defendants.

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ORDER OF PARTIAL  
SUMMARY JUDGMENT

Civil No. C-84-2857

Judge David S. Young

---

Pursuant to the Findings of Fact and Conclusions of Law, and  
pursuant to the Memorandum Decision entered with respect to Salt

Lake City Corporation's Motion for Partial Summary Judgment in the above entitled matter, the Court hereby Orders that:

1. Salt Lake City Corporation's Motion for Partial Summary Judgment is hereby granted and the Complaint of James Constructors, Inc. in this matter is hereby dismissed with prejudice.

2. James Constructors, Inc. was required under the Contract with Salt Lake City Corporation to provide either select materials from native soils or to furnish proper import materials, at its own expense, as part of its unit price per lineal foot of pipe installed, to achieve necessary compaction of the bedding and backfill for the pipe and to prevent settlement as required by the Specifications.

3. Inspection by Salt Lake City inspectors or any alleged failure to adequately inspect the work performed by James did not modify, waive, or relieve the responsibility of James Constructors, Inc. to construct the pipeline in conformance with the Contract Specifications. Salt Lake City had no duty under the Contract to inspect the project for the benefit of James Constructors, Inc. and the occurrence, adequacy or extent of any inspection by SLCC is irrelevant and immaterial to any of the issues in this lawsuit.

4. James Constructors, Inc. was responsible under the Contract for performing the work in a workmanlike manner and responsible for assuring the result as satisfactory. Any advice

which James Constructors, Inc. may have received from SLCC inspectors is not binding on the SLCC engineer in any way and does not in any way release James Constructors, Inc. from fulfilling all of the terms of the Contract.

5. James Constructors, Inc. is not entitled to payment for the extra work claims alleged in its Complaint.

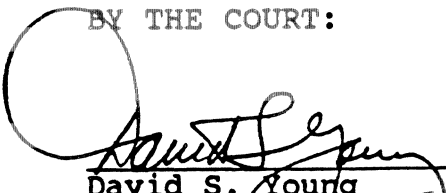
6. James Constructors, Inc. is not entitled to any recovery under or outside the Contract for any delay damages, stand-by time, construction sequence changes or other hindrances, however caused, in the prosecution of the work.

7. The Contract between Salt Lake City Corporation and James Constructors, Inc. required James Constructors, Inc. to repair defects in the project, including settlement of bedding or backfill, damage to utilities, or damage to pipe, at its own expense and without any additional compensation from Salt Lake City Corporation.

8. James Constructors, Inc. is not entitled to any recovery for lost profits.

Dated this 15<sup>th</sup> day of ~~May~~ <sup>June</sup>, 1988.

BY THE COURT:

  
\_\_\_\_\_  
David S. Young  
District Court Judge

APPROVED  
H. D. [illegible]  
[illegible]

## APPENDIX E

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

James Constructors, Inc.,  
Plaintiff and Appellant,  
v.  
Salt Lake City Corporation,  
Defendant and Respondent.

Salt Lake City Corporation,  
a municipal corporation of the  
State of Utah,

Plaintiff,

v.

James Constructors, Inc., a  
Nevada corporation; Hood  
Corporation, a California  
corporation; and Industrial  
Indemnity Company, a  
California corporation,

Defendants.

OPINION  
(Not For Publication)

Case No. 880502-CA

FILED

JAN 19 1990  
*Shirley J. ...*  
Clerk of Court  
Utah Court of Appeals

Third District, Salt Lake County  
The Honorable David S. Young

Attorneys: Bryce E. Roe, Salt Lake City, for Appellant  
Wilford A. Beesley and Stanford P. Fitts, Salt  
Lake City, for Respondent

Before Judges Davidson, Bench, and Jackson.

BENCH, Judge:

James Constructors, Inc. (Contractor) appeals the entry of a  
partial summary judgment in a suit on a construction contract.  
We affirm.

APPENDIX E

Contractor entered into an agreement with Salt Lake City (City) for the construction of a municipal water pipeline. After some pipe had been installed, City discovered and notified Contractor of certain defects in the project, including the excessive settlement of trenches. When the defects were not corrected, City terminated the contract. Contractor filed a complaint seeking damages for wrongful termination of the contract. City filed its own complaint wherein it sought damages to cover the costs of repairing the defects and completing the project. The two actions were consolidated by district court order.

After extensive discovery, City moved for summary judgment on Contractor's complaint. The district court granted the motion. Although City's action against Contractor was still pending, the court certified the partial summary judgment as appealable under Utah R. Civ. P. 54(b).

The district court held that, based on the clear and unambiguous language of the contract, City was entitled to summary judgment on Contractor's complaint. Generally, in reviewing a summary judgment, "we inquire whether there is any genuine issue as to any material fact and, if there is not, whether the moving party is entitled to judgment as a matter of law." Arrow Indus. v. Zions First Nat'l Bank, 767 P.2d 935, 937 (Utah 1988). "Contract interpretation 'may be either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent.'" Copper State Leasing Co. v. Blacker Appliance & Furniture Co., 770 P.2d 88, 90 (Utah 1988) (quoting Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985)). Whether ambiguity exists in a contract is a question of law which we review for correctness. See Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1988); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). "When a contract is unambiguous, its interpretation is [also] a question of law." Wilburn v. Interstate Elec., 748 P.2d 582, 584 (Utah Ct. App. 1988), cert. dismissed, 774 P.2d 1149 (Utah 1989).

In its complaint, Contractor alleged that City had wrongfully terminated the parties' contract and that, as a result, Contractor had suffered the following damages: (a) \$427,601.23 for delays, construction sequence changes, and standby time costs; (b) \$92,698.97 for repairs to the project, including repairs associated with settlement and sinkholes in the trench, and other items; and (c) \$6,542.88 for demobilization costs. The district court held that such claims were precluded under the clear language of the parties' contract. We agree.

Contractor claimed these damages as "extras." The contract contains the following provision: "No extra work shall be

performed or paid for without a written order for such work." If delays, construction sequence changes, standby time costs, and repairs are truly "extras," recovery is available only if City prepared a written order for such work. It is undisputed that no such order was prepared.

In any event, the contract clearly precludes recovery for the specified damages. For example, section 5.06 of the contract provides: "The Contractor shall not be entitled to any claim for damage on account of hindrance or delay from any cause whatsoever . . . . In no event shall City be liable for or Contractor be entitled to any damages for such a delay."<sup>1</sup> Section 101.09(b) provides, "The [City] reserves the right to determine the sequence of construction which may be most opportune to the [City]." Section 2.13(c) provides:

If the performance of the Contractor is likely to be interfered with by the simultaneous execution of some other contract or contracts, the [City] may decide which contractors shall cease work temporarily and which contractor shall continue . . . . The City shall not be responsible for any damages suffered or extra costs incurred by the Contractor resulting directly or indirectly from the performance or attempted performance of any other contract or contracts.

Section 4.08 provides: "The Contractor shall rebuild, repair and restore, and make good all injuries or damages to any portion of the work occasioned by [the acts of God or the elements or from any other cause] before final acceptance and shall bear the expense thereof." Section 190.04 provides:

Replacement of earth fill or backfill, where it has settled below the required finish elevations, shall be considered as a part of such required repair work . . . . If the Contractor fails to make such repairs or replacements promptly, the

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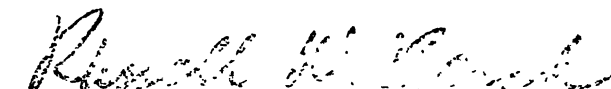
1. In place of damages, the contract provided for extensions to allow Contractor an opportunity to complete the work. See Western Eng'rs, Inc. v. State Rd. Comm'n, 20 Utah 2d 294, 296 n.2, 437 P.2d 216, 217 n.2 (1968) ("when parties to a contract foresee the possibility of delay and provide therefor by extensions of time, it is to be presumed that the parties intended such prescribed remedy to be exclusive for such delay").

[City] reserves the right to do the work and the Contractor and his surety shall be liable to the [City] for the cost thereof.

Contractor relies upon provisions of the contract pertaining to such things as the process of selecting backfill material and City's right to inspect the project. These provisions do not affect those set out above. Under the unambiguous wording of the parties' agreement, Contractor was not entitled to recover any of the damages Contractor claimed in its complaint.

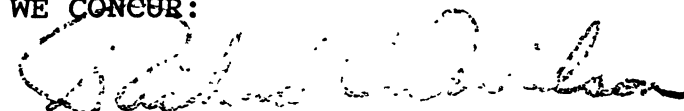
On appeal, Contractor contends that summary judgment is precluded by the existence of disputed issues of material fact relative to alternative theories of recovery such as independent contract, modification, rescission, estoppel, and waiver. These issues were neither pleaded nor presented to the district court and cannot be raised for the first time on appeal. See Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 46 (Utah Ct. App. 1988); see also Bundy v. Century Equip. Co., 692 P.2d 754, 758 (Utah 1984).

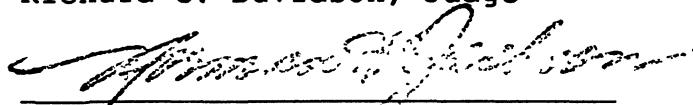
The partial summary judgment is hereby affirmed.

  
\_\_\_\_\_  
Russell W. Bench, Judge

-----

WE CONCUR:

  
\_\_\_\_\_  
Richard C. Davidson, Judge

  
\_\_\_\_\_  
Norman H. Jackson, Judge



COVER SHEET

CASE TITLE:

James Constructors, Inc.  
Plaintiff and Appellant,  
v.  
Salt Lake City Corporation,  
Defendant and Respondent.

Case No. 880502-CA

---

Salt Lake City Corporation,  
a municipal corporation of the  
State of Utah,  
Plaintiff and Respondent,

v.  
James Constructors, Inc., a Nevada  
corporation, Hood Corporation,  
a California corporation, and  
Industrial Indemnity Company,  
a California corporation,  
Defendants and Appellants.

PARTIES:

Bryce E. Roe (Argued)  
Fabian & Clendinen  
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Salt Lake City, UT 84147

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Wilford A. Beesley (Argued)  
Stanford P. Fitts  
Beesley, Spencer & Fairclough  
Attorneys at Law  
310 Deseret Book Building

TRIAL JUDGE:

Honorable David S. Young

January 19, 1990. OPINION. (Not For Publication)

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, affirmed.

Opinion of the Court by RUSSELL W. BENCH, Judge; RICHARD C. DAVIDSON, and NORMAN H. JACKSON, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 22nd day of January, 1990, a true and correct copy of the foregoing OPINION was deposited in the United States mail or personally delivered to each of the above parties.

  
\_\_\_\_\_  
Deputy Clerk

TRIAL COURT:

Third District Court, Salt Lake County, #C84-2857

## APPENDIX F

IN THE UTAH COURT OF APPEALS

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James Constructors, Inc.	)	ORDER DENYING REHEARING
	)	
Plaintiff and Appellant,	)	
	)	
v.	)	Case No. 880502-CA
	)	
Salt Lake City Corporation,	)	
	)	
<u>Defendant and Respondent.</u>	)	
	)	
Salt Lake City Corporation,	)	
a municipal corporation of the	)	
State of Utah,	)	
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	
	)	
<u>James Constructors, Inc., a</u>	)	
Nevada corporation, Hood	)	
Corporation, a California	)	
corporation, and Industrial	)	
Indemnity Company, a California	)	
corporation,	)	
	)	
Defendants and Appellants.	)	

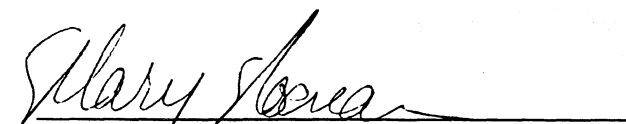
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THIS MATTER having come before the Court upon  
Appellant's Petition for Rehearing,

IT IS HEREBY ORDERED that the Appellant's Petition for  
Rehearing is denied.

Dated this 15th day of February 1990.

FOR THE COURT

  
Mary T. Noonan, Clerk

CERTIFICATE OF MAILING

I hereby certify that on the 16<sup>th</sup> day of February, 1990, a true and correct copy of the foregoing ORDER DENYING REHEARING was deposited in the United States mail.

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Honorable David S. Young  
District Court Judge  
240 East 400 South, Room 504  
Salt Lake City, UT 84111

DATED this 16<sup>th</sup> day of February, 1990.

By

  
Deputy Clerk