

1958

Huber & Rowland Construction Co. v. City of South Salt Lake : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

FILED
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HUBER & ROWLAND CONSTRUCTION CO.,

Plaintiff and Appellant

vs.

CITY OF SOUTH SALT LAKE,
Defendent and Respondent

Clerk, Supreme Court, Utah

Case No.
8766

APPELLANT'S BRIEF

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STATEMENT OF FACTS

On June 22, 1954, appellant entered into a contract with respondent, in which appellant agreed to perform certain work for respondent, consisting principally of construction of sidewalk, curb and gutter, the said project being known as South Salt Lake Special Improvement District #5. All of the work required by the contract to be performed by appellant was completed by Sept. 12, 1955, including the removal of 64,904 square feet of old sidewalk as required by

the contract. The price agreed to be paid for the performance of the said work was the contract unit bid price per item, as shown in the Proposal, for the quantities of work actually performed. The contract, and contract documents specifically made a part of the contract, including the Proposal, Instructions to Bidders, and Specifications, were received into evidence and designated as part of the record on this appeal. The Proposal includes the bid price for all of the work to be performed, except that it does not specifically include an item for sidewalk removal. Respondent contended that the item of "Structural Excavation" included the removal of old sidewalk. The Specifications define "Structural Excavation" as follows:

STRUCTURAL EXCAVATION

2.4.1. Description. Structural excavation shall include the performance of all operations incidental to the excavation of earth and rock, of whatever kind, for structures on this project. It shall include backfill and embankment of excavated material, the disposal of all material not required, or not suitable for backfill or embankment, and the cleanup and restoration of surfaces except as hereinafter specifically provided.

It is appellant's contention that an item of sidewalk removal was omitted from the Proposal either through inadvertence or mistake, and that no price being agreed upon for such work, it is entitled to a reasonable price. On Sept. 6, 1956, appellant commenced an action in the District Court for the Third Judicial District, State of Utah, for payment for the removal of such old

sidewalk alleging that a reasonable price was 5¢ per square foot, or a total of \$3,245.20. Trial was held on Sept. 20, 1957 in the District Court, the court sitting without a jury. The trial court found that payment of \$600.75 for sidewalk removal was made to appellant at the rate of 75¢ per cubic yard, the contract price for structural excavation, for 801 cubic yards, the equivalent of 64,904 square feet of 4-inch sidewalk. The trial court further found that there is no trade practice or custom in the construction industry requiring a construction of the contract different from, or in modification of, the written contract, and found as a matter of law, from a construction of the contract, that the sidewalk removal was a part of the excavation work covered by the contract. Accordingly, the trial court entered judgment for the respondent, no cause of action, on the First Cause of Action, for the removal of the old sidewalk. The trial made no findings of fact on the other issues as set out in the Pre-Trial Order on the First Cause of Action, as to whether or not there was an accord and satisfaction, or the reasonable price per square foot for the removal of the old sidewalk.

Appellant accepts the findings of fact of the trial court as being correct, but believes that the conclusions of law from a construction of the contract are incorrect, and since the Judgment on the Second Cause of Action and defendant's Counterclaim are not appealed from, the only issue presented to this Court on this appeal is, therefore, whether or not the trial court erred in construing the contract, concerning payment for sidewalk removal.

STATEMENT OF POINTS

POINT I

THE DISTRICT COURT, IN ITS INTERPRETATION OF THE CONTRACT BETWEEN APPELLANT AND RESPONDENT, ERRED IN ITS CONCLUSION OF LAW THAT THE SIDEWALK REMOVAL WAS A PART OF THE EXCAVATION WORK COVERED BY THE CONTRACT.

ARGUMENT

The first question to be disposed of is, does the definition of "Structural Excavation" include the removal of man-made concrete structures. The specifications quoted above, page 2, state that structural excavation shall include the performance of all operations incidental to the excavation of "earth and rock" of whatever kind. The term "rock" is defined in Webster's International Dictionary, 2nd Edition as:

3. Geol. Solid mineral matter of any kind occurring *naturally* (emphasis added) in large quantities or forming a considerable part of the earth's mass; also, a particular mass or kind of such material. Rock may be consolidated or unconsolidated, and composed of one mineral or, more commonly, of two or more; or it may be to a greater or less extent of organic origin, as coal

In *City of Chicago v. Duffy*, 117 Ill. App. 261, the court said "The term 'rock' in ordinary language is the stony matter which constitutes earth's crust as

distinguished from clay, gravel, sand, peat, etc.” To the same effect is *Okey v. Moyes*, 91 NW 771, 117 Iowa 514. 19 Encyclopedia Britannica 364, 14th Edition, says:

“Rock, in geology a mass of the mineral matter of which the crust of the earth is composed. In more general usage a ‘rock’ is a large mass of this mineral matter, as distinguished from smaller pieces, ‘stones’ ”.

From the foregoing citations, it is too clear to warrant further discussion that the term “rock” does not comprehend man-made concrete sidewalk.

Nevertheless, the trial court found that payment was in fact made for sidewalk removal at the price agreed upon for structural excavation, and found as a matter of law, that the contract provided that such sidewalk removal was a part of such excavation. It is difficult to understand upon what basis such a conclusion could be reached.

If the removal of the old sidewalk was not included in any of the items scheduled in the Proposal, it becomes necessary to determine if it was the intent of the parties, as found in the contract, that no payment should be made for any work required by the contract, but not specifically included in any of the items in the Proposal.

It is important here to distinguish between minor details and work incidental to other prescribed work, and wholly separate work which is not incidental to

other work. For example, it would be understood by everyone that where it is prescribed that a certain concrete structure be constructed, that incidental to such work would be the erection of forms necessary to pouring the concrete. But this is quite a different thing from simply prescribing the construction of a concrete structure, and then contending that major excavation to establish a proper elevation for the structure is incidental to this work, particularly where excavation is separately provided for. It is the latter situation at issue here. The removal of old sidewalk was necessary to establish proper grades for the new sidewalk, and the only provisions for payment for structural excavation so define structural excavation as to expressly exclude sidewalk removal, so that it cannot be contended that the sidewalk removal was incidental to such work.

If it were the intent of the parties, however, there would be no problems or difficulties in a contract which might provide, for example, that the contractor shall do excavation, remove trees, and construct sidewalk, and that for such excavation, removal, and construction, the contractor should be paid so much a yard for excavation actually done and nothing extra for the tree removal and sidewalk construction. Indeed, there is language in this contract, which if read alone, could be construed to mean that payment of such work as is listed in the Proposal shall constitute payment for all work whether or not listed in the Proposal. But from a reading of the contract as a whole, it is clear that no such basis of payment was

contemplated. Nor do the pleadings or findings by the trial court indicate that such a basis of payment was intended. (Note that Par. 5, First Cause of Action of respondent's Answer states that "defendant alleges that the 'Proposal' as contained in said written Contract set forth the items, description, quantity, unit price and total amount *for the various portions of the work to be done under the terms of the Contract.*" Again in Par. 8, "defendant alleges that the sidewalk removal *as a part of the excavation work* covered by the Contract was included within the terms of the Contract." (Emphasis added.)

The specifications cover in minute detail what work is to be performed under each item in the Proposal, and the items in the Proposal include every single item of work required to be performed under the contract with separate provisions for extras or force work, *with only one exception*—there is omitted a bid item for sidewalk removal. Nowhere does the contract give notice or warning to the bidders that if any work to be performed other than minor details and incidental work is excluded from the Proposal, that such work must be done without extra compensation. Nor has respondent ever asserted that such was the intent of the parties, but on the contrary, attempted to satisfy this obligation by making payment on the basis of the price to be paid for excavation of earth and rock.

From reading of the contract as a whole, and from the pleadings and findings by the trial court, one fact becomes unmistakably clear, and upon which appellant's cause of action is predicated—that is, that

it was the intent of the parties, both appellant and respondent, that the schedule of bid items should include all work to be done under the contract (except for force work which is separately provided for and except for minor details and incidental work). The conclusion is inescapable that the removal of old sidewalk was omitted, either from the definition of structural excavation or as a separate bid item in the Proposal, either through inadvertence or mistake.

It is stated in 13 C.J. 271 "A contract, it may truly be said, includes not only what the parties actually write down or say, but all those things which the law implies as part of it, and likewise all matters which both the parties intend to express but do not", citing *In re Pierce, etc., Mfg. Co.*, 231 Fed. 312, 320; *E. I. Du Pont de Nemours Powder Co. v. Schlottman*, 218 Fed. 353, 134 CCA 161, and many others. A discussion in *Mace v. Cole*, 50 N.D. 866, 198 NW 816, 35 A.L.R. 1391, is particularly apropos. This was a case in which plaintiff was attempting to establish a lien under a lien law which allowed such liens only where the "price agreed upon is definitely fixed" and the court, in holding for the plaintiff even though no specific price was stated, said:

It does not follow from the mere fact that the parties did not mention a definite price for the threshing that a price was not agreed upon. For a contract includes not only what the parties say, but also what is necessarily to be implied from what they say. *Grossman v. Schenker*, 206 N.Y. 466, 469, 100 NE 39. What is

implied in an express contract is as much a part of it as what is expressed. Bishop on Contracts (2d Ed.) Sec. 241; 13 C.J. 271. See, also, sections 5915-5917, C.L. 1913. Thus, in sales of personal property, not infrequently the agreement in terms states merely that one party will buy or that he will sell certain goods without stating any correlative obligation on the part of the other party. Williston on Contracts, p. 154. In such case the law supplies the promise on the part of the purchaser to pay the purchase price. If the parties have by any course of dealing made it possible for a reasonable man in their position to understand their intention as to the price, it will be fixed by this understanding, based on previous course of dealing as effectually as if stated in words. Williston on Sales, Sec. 167. But, where the facts and circumstances are such that it must be said that the parties did not fix a price at all, or provide any mode for ascertainment thereof, the law implies a stipulation that the seller shall sell at, and the buyer shall pay, a reasonable price. Williston on Sales, Sec. 166, 171.

Consistent with the foregoing is the statement of this Court in *Cummings et ux v. Nielson et al*, 42 Utah 157, 166, 129 P. 619. This Court said "It is a cardinal rule of construction that that which is implied is always as much a part of any writing as that which is expressed", and citing 2 Page on Contracts, sec. 1118, "Since a contract is to be construed as a whole, terms which can be inferred from a consideration of the entire instrument are as much a part of the contract as if expressly set forth therein". It is appellant's contention that one of the "terms which

can be inferred from a consideration of the entire instrument" is that payment is to be made for all major work required by the contract, and that if no unit price is shown in the Proposal, a reasonable price shall be paid. In any case, the law implies that a reasonable price shall be paid in such circumstances.

There are only three possible hypotheses that could account for the omission of sidewalk removal from the Proposal. 1.—The respondent, through inadvertence, simply failed to make any provision for the price to be paid for this work. 2.—The respondent, erroneously, believed that sidewalk removal was included in the definition of structural excavation. 3.—The respondent deliberately failed to make any provision for payment for sidewalk removal with the hope of getting something for nothing. In either of the first two situations, it is clear that the parties intended that the appellant should be paid for this work and the foregoing statements of law being applicable, appellant is entitled to recover a reasonable price. Under the third possibility, which appellant does not believe to be the correct one, even if the contract were construed to mean that no payment was to be made for work excluded from the Proposal, such a contract would obviously constitute a fraudulent attempt to mislead and deceive the bidders. In such a case, the law is clear that appellant would be entitled to reformation of the contract to conform to what the appellant was fraudulently induced to believe it to be. 45 Am. Jur. 613, Reformation of Instruments, Sec. 51 et seq.

If it had been the intent of the parties to include sidewalk removal as part of the excavation, there would have been no reason to specifically show on the plans what sidewalk was to be removed.

Although the plans showed what old sidewalk was to be removed, and appellant is chargeable with knowledge that such work had to be done, since there was no place to enter a bid for this work in the Proposal, and since the Specifications (Sec. 1.2.1 and 1.2.3, *infra* page 13) indicate that no change is to be made in the Proposal, and since the contract is a unit price contract based on the quantities of work actually done rather than a lump-sum contract, any reasonable person would certainly be entitled to believe that this item was omitted through error and that payment would be made therefore at a reasonable price or at a price subsequently to be agreed upon. Support for this belief is found in Sec. 1.2.8, "The bidder's attention is called to the fact that the quantities of work to be done and materials furnished under these specifications as shown in the proposal are approximate only and are for the purpose of comparing bids and fixing the amount of bonds and that payment will be made only on the basis of the above unit prices in the actual quantities, as determined by the Owner's Engineer in the completed work."

If there is any inconsistency or ambiguity in the contract in this regard, or if there remains any doubt as to the intention of the parties, such doubt should be resolved in favor of appellant.

In *Monnett vs. Monnett*, 46 Oh. St. 30, 34, the court said:

The words of obligation in a contract are interpreted most strongly against the obligor for it is presumed that he used those most favorable to his interests; and all doubtful terms or ambiguous words are to be construed against him. He who speaks should speak plainly, or the other party may explain to his own advantage.

Numerous similar statements are to be found in citations in Williston on Contracts, Revised Edition, sec. 37.

The following statement from Williston on Contracts, Sec. 621, citing many causes, is of particular significance:

Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter . . . This rule finds frequent application to policies of insurance which are ordinarily prepared solely by the insurance company, and the words, therefore, are construed most strongly against it.

Appellant believes that what is said about insurance companies is equally applicable in the case of most construction contracts. The contract is prepared solely by the owner or his engineer and the contractor has no voice whatever in the terms of the con-

tract—he must take it as he finds it or not at all. In this contract, Sec. 1.2.1 of the Specifications provides “The bidder must submit his proposal on the form furnished by the Engineer. All blank spaces must be filled in correctly where indicated for each item where a quantity is given . . .”, and again in Sec. 1.2.3 “Proposals may be rejected if they show any omissions, *alteration of form, additions not called for*, conditional or alternate bids, or irregularities of any kind.” (Emphasis added.)

CONCLUSION

It was the intent of the parties that the bid schedule in the Proposal should comprehend all of the work required to be done by the contract, and that a bid item for removal of old sidewalk was omitted through inadvertence or mistake, and that since no price was agreed upon for this work, appellant is entitled to a reasonable price. The trial court therefore erred in its determination that as a matter of law, the sidewalk removal was included in the provisions for structural excavation, and that the Amended Judgment of the trial court for the respondent on the First Cause of Action should be reversed with a new trial granted for the determination of the remaining issues concerning accord and satisfaction and determination of a reasonable price per square foot for sidewalk removal.

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