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Zions Cooperative Mercantile Institution v. Jacobsen Construction Co., John Graham and Company, Dames and Moore, Keith W. Wilcox, Individually, and Keith W. Wilcox and Associates, and F. C. Torkelson Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME CO
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IONS COOPERATIV
MERCANTILE INS
Plaintiff

vs.

JACOBSEN CON
JOHN GRAHAM
AMES AND MOU
ILCOX, indivi
W. WILCOX
F. C. TOH
Defen

BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS COOPERATIVE MERCANTILE INSTITUTION,
Plaintiff and Respondent,

vs.

JACOBSEN CONSTRUCTION CO., JOHN GRAHAM AND COMPANY, DAMES AND MOORE, KEITH W. WILCOX, individually, and KEITH W. WILCOX AND ASSOCIATES, and F. C. TORKELSON COMPANY,
Defendants and Appellant.

Case No. 12431

BRIEF OF APPELLANT

STATEMENT OF CASE

Plaintiff brought this action against the architects, contractor and sub-contractor for damages suffered as a result of the collapse of the sheet pile retaining wall during the erection of plaintaiff's new department store building in Ogden, Utah. Plaintiff sued the various

defendants for costs of reconstruction of the retaining wall and damages incident to its collapse.

DISPOSITION IN LOWER COURT

After completion of pretrial discovery, the case was assigned to Judge Leonard W. Elton for pretrial and for hearing of arguments on Motions for Summary Judgment filed by the parties. The pretrial conference, including the hearings on the motions, lasted for about two days, during which time certain documents were admitted into evidence for the purpose of consideration during the arguments. It was also agreed by the parties at the pretrial that F. C. Torkelson & Company had provided an adequate design for the support of the sheet pile wall based on the information they received concerning soil data from Dames & Moore. By stipulation, the Court dismissed Torkelson & Company from the suit. It was also agreed by the remaining parties that there was no evidence at the time the motions were argued to indicate that Jacobsen had negligently or improperly constructed the supporting system or that it was not done in accordance with the design and drawings provided by the design engineers, Torkelson & Company. The Court then informed all concerned that the motions would be taken under advisement and upon making a ruling on the motions, the Court would draft a pretrial order in accordance therewith. Prior to making any rulings or the preparation of any pretrail order, Judge Elton died. The case was then reassigned to the

Honorable Bryant H. Croft, Judge, who again set the matter on the calendar for disposition and at the request of this defendant and others, a morning session was held where brief arguments were heard concerning the Motions for Summary Judgment.

Thereafter, Judge Croft filed a Memorandum Decision (R-370). In the Judge's decision, he ruled as a matter of law that defendant, Jacobsen, was negligent and that its negligence proximately caused or contributed in causing the failure of the sheet pile wall, resulting in plaintiff's damage. The Court also denied Jacobsen's Motion for Summary Judgment against the plaintiff on the ground of payment by the plaintiff to Jacobsen for the damages now sought to be recovered. The Court further ruled in its Memorandum Decision that defendant Jacobsen's defense of payment raised against the plaintiff was an invalid defense and could not be raised as an issue at the time of trial of the case. The Court denied all other Motions for Summary Judgment. From the Court's Summary Judgment against Jacobsen, this appeal is taken.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Summary Judgment granted by the lower court and for a trial on all issues of fact, or in the alternative, for an order dismissing plaintiff's complaint based upon issues of law presented in Jacobsen's Motion for Summary Judgment.

STATEMENT OF FACTS

In order to promote clarity, the appellant will hereinafter be referred to as Jacobsen and the respondent as ZCMI.

Since this appeal is taken from an Order of Summary Judgment, Jacobsen will review all facts and reasonable inferences to be drawn therefrom in a light most favorable to Jacobsen. (Young vs. Texas Company, 8 Ut.2nd 206, 331 P.2nd 1099.)

ZCMI employed John Graham & Company, a Seattle, Washington architectural firm, to design a new department store to be located in Ogden, Utah (R-7). Thereafter, a site was selected for the new department store to be located on Washington Boulevard and 24th Street at the northeast corner of the intersection (Exhibit 24-P).

ZCMI desired construction to commence as soon as possible. It employed Jacobsen to construct the building on a cost-plus basis rather than submit the job to public bid. Jacobsen was to receive a set fee for the construction of the building plus the costs of labor and materials, and sub-contract costs (R-13). As the job progressed, Jacobsen was to submit periodic statements to the architects for their certificate of approval and thereafter receive payment from ZCMI. It was also provided in the contract that certain expenses, such as employment of sub-contractors, were to be submitted to the architects for approval prior to their employment (R-14, P.d).

Jacobsen's contract with ZCMI was entered into on or about August 2, 1965 and thereafter, Jacobsen commenced demolition of the existing structures located at the construction site.At the time of demolition, all existing utility lines within the boundary of the construction site were either shut off or removed. After the land had been cleared, Jascobsen commenced driving sheet pile along the east boundary of the construction site to retain the alley way. Excavation was to occur west of the alley for the basement of the new building. The land where the building was to be erected sloped from east to west. The sheet piling used was approximately 40 feet long and 16 inches wide, with an edge that permitted one sheet to be interlocked with the adjoining sheet as the piling was driven, resulting in a continuously joined steel wall running north and south along the alley way. The piling was driven to ground level before any excavation had commenced. The excavation was to occur west of the sheet pile wall at a depth of approximately 30 feet, leaving approximately ten feet of the sheet piling into the earth below the bottom of the excavation. The exposed area of the sheet piling was then to be braced into the excavated area by the use of steel bracing supported by thrust blocks in the floor of the excavation (Exhibits 27-P, 3-P and 36-P). The driving of the sheet piling was sub-contracted to Raymond Pile Driving Company, specialists in this field. While the piling was being driven but before any excavation had occurred, defendant, Dames & Moore Company, soil consultants and engineers, contacted

Jacobsen and asked that they be hired to provide Jacobsen with the necessary engineering and soil survey data from which structural engineers could design the support system for the sheet pile wall. (Deposition of Warren D. Curtis, pgs. 11-13). Dames & Moore hold themselves out as consultants in applied earth sciences, soil mechanics, engineering geology, and geophysics (Exhibit 3-P).

Jacobsen requested that the architects approve and ZCMI grant authority to employ Dames & Moore for the purpose mentioned above. Approved was received. Dames & Moore thereafter prepared a document entitled "Consultation Regarding Lateral Support" and delivered the same to Jacobsen wherein there was furnished design criteria and engineering data to be used by consulting structural engineers in the design of the support system for the retaining wall (Exhibit 3-P). Jacobsen then employed F. C. Torkelson & Co. design engineers, to design the support system for the sheet pile wall based upon the Dames & Moore data.

Jacobsen followed the design system provided by Torkelson and installed the necessary support system. Before the accident occurred, the entire support system had been installed and excavation completed. The driving of structural piling was in progress immediatley preceding the accident. There had been approximately 300 structural piles driven into the floor of the excavation which were to remain there permanently in support of the building. Concrete pile caps were poured over the top of the structural piling upon which foot-

ings were to rest. Dames & Moore provided a full-time engineer on the job site to supervise the structural pile driving operation and to make reports to his company concerning the same. In addition thereto, the defendant, Wilcox, an architect and engineer residing in the Ogden area was employed by John Graham & Company to act as its local representative in inspecting the construction and to make reports as required by the architects' contract.

The day before Thanksgiving, November 23, 1965, there had been driven all but one or two structural piles. During the Thanksgiving Day Holiday, the sheet pile wall collapsed into the excavated area causing an enormous amount of water and mud to pour into the construction site. It was discovered that behind the sheet pile wall on the east, running from south to north, was buried a six-inch high-pressure water main in the alley way. This line had ruptured, causing a large quantity of water to escape into the earth behind the sheet pile wall. In doing so, unexpecetd pressures built up behind the wall. The wall was not designed to withstand such pressure and failed.

A visual examination of the premises also revealed that north and east of the sheet pile wall, and not on the construction site itself, was located a fire hydrant in the alley way. The water main that ruptured was servicing this hydrant (Exhibit 22-P).

Two weeks prior to the rupture of the water line and collapse of the sheet pile wall, it was noted that

a crack was developing along the alley way running parallel with the sheet pile wall. This crack was observed by the employee of Dames & Moore, the soil engineer. The employee reported the development of the crack to his superiors in Salt Lake City. He was told to keep track of the movement of the wall. He also took photographs of the crack and delivered them to his superiors (Exhibits 45-P and 46-P). Mr. Warren Curtis, the local partner of Dames & Moore, after viewing the photographs and receiving the information from his employee, Mr. Kochevar, went to the construction site in Ogden to observe the cracks personally. He concluded that there was no hazard presented to the construction site if there were no utilities in the alley way at the time. Mr. Curtis admits that certain holes had been drilled in the alley way and that data had been obtained and provided to the architects regarding the sub-soils of the area so that an adequate foundation could be designed. In addition thereto, Mr. Curtis admitted Dames & Moore never checked for the existence of water lines in the area before the test holes were drilled. He also admitted that no such investigation had ever been conducted by his company prior to furnishing its consultation report to Jacobsen or even after having received notice of the development of the crack in the alley. (Deposition of Warren Curtis, p. 15, and pgs, 86, 87, 104 and 105.) After observing the crack in the alley way, Mr. Curtis testified in his deposition that he told Kochevar to inquire of Jacobsen's employees whether or not there were any utility

lines in the alley way. The Dames & Moore employees testified that they made inquiries of Jacobsen employees about the same and were told there were none. The Jacobsen employees specifically deny that any inquiries were ever made. (Deposition of Warren Curtis, p. 16; deposition of Richard Sperry, p. 26; deposition of Steve Jacobsen, p. 22.)

The lower court's Memorandum Decision granted summary judgment, based upon facts which the court assumed to be undisputed. However, the court reserved to the parties the right to dispute these facts at trial if they so desired (R-378).

Before any construction had been started on the job site, a site survey of existing utilities was made by the survey firm of Caldwell, Richards & Sorensen at the request of the Seattle architects, John Graham & Company. In this survey and drawing, reference was made to the location of a water main and a hydrant but the drawing was never provided to Jacobsen for use on the job site (Exhibits 22-P and 24-P; Deposition of Richard Scales, p. 13). The architects did provide a bound document entitled "Design Criteria and Outline Specifications," which stated therein "six-inch line along alley." This appeared under the utility section (Exhibit 1-P). It was apparent from the testimony of the persons on the job site that everyone thought the water main referred to in the design criteria ran from the hydrant north of the construction site to 23rd Street and was not behind the retaining wall (Deposition of Steve Jacobsen, pgs. 7, 8 and 9).

After the wall failed, a new sheet pile wall was installed and construction continued. To ascertain the cause of the failure of the wall, ZCMI employed Dames & Moore Company to make such a determination. Their report is on file herein as Exhibit 4-P and contains a survey of the damage to the site and then states "The approximate location of the line is shown on Plate 1. This fire line was not used for other water service purposes and had not been found in the normal identification of the utility lines for construction." (Exhibit 4-P, Page 3.)

ZCMI filed its complaint on July 12, 1966. In the complaint, it alleged that Jacobsen was negligent in the erection of the sheet pile wall, causing damage to to the plaintiff as set forth in the complaint. Jacobsen filed an answer to the complaint and set forth its defenses denying its negligence as claimed by the plaintiff and affirmatively alleging that it had been paid by ZCMI for the work performed and its payment was a defense to the plaintiff's claim. After ZCMI received its report from Dames & Moore as to the probable cause of the failure of the wall and after more than one (1) year had elapsed from receipt of this report, it nevertheless made final payment to Jacobsen for the costs involved in the construction of the building and in addition thereto, and over one (1) year after filing this law suit, paid Jacobsen its profit in the job.

POINTS FOR REVERSAL

POINT I

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED UPON DISPUTED ISSUES OF FACT.

POINT II

THE COURT ERRED IN RULING AS A MATTER OF LAW THAT PAYMENT TO JACOBSEN BY ZCMI WOULD NOT DEFEAT RECOVERY BY ZCMI AND COULD NOT BE MADE AN ISSUE AT TRIAL.

ARGUMENT

POINT I

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED UPON DISPUTED ISSUES OF FACT.

All gas, electric and water lines, including sewer connections, had been capped or removed from the construction site before any construction began. Jacobsen had employed experts, Dames & Moore, to investigate and provide necessary soil data and stress figures to be used in the design and installation of a retaining system for the sheet pile wall. They were selected with the approval and consent of the architects and ZCMI. Jacobsen relied on the experts that were hired. When

Warren Curtis, a partner in Dames & Moore, was asked about the investigation his company was to have made before submitting the report concerning lateral support of the wall (Exhibit 3-P), Mr. Curtis stated:

"Q: After you got the sheet pile engagement from Leo Jacobsen, did you conduct another field investigation in connection with the sheet pile bracing?

"A: No. We used the data that we had developed in the initial investigation, that is, the test data. We conducted the analysis in relation to this particular job."
(Deposition of Warren Curtis, p. 15.)

Mr. Curtis stated that when he contacted Mr. Jacobsen concerning his company's employment to furnish data for the supporting structure of the sheet pile wall, he agreed to go to the site and look over the situation and obtain data regarding physical dimensions to be satisfied. He was asked in his deposition

"Q: Did you specifically ask Mr. Jacobsen whether there were any water lines in the vicinty of the sheet pile wall?

"A: No. I think I raised the question of utility lines.

"Q: Does Dames & Moore ever make an investigation to find out whether there are utility lines in the soil where you are working on soil mechanics and movement?

"A. No. We specialize in soil mechanics as such."
(Deposition of Warren Curtis, pgs. 16 and 18.)

Mr. Curtis was asked whether or not he made inquiry or asked about a utility survey that might be on the job showing location of the utilities outside of the construction area.

"Q: Did you ask if there was one, a site survey?

"A: No. It obviously just wasn't there so if it wasn't in the normal place, I made the assumption or assumed that there had been no site survey made."
(Deposition of Warren Curtis, p. 19.)

Mr. Curtis testified that prior to doing the soil survey for the sheet pile wall, his company had been employed by the architects to core drill the alley way and other locations on the construction site itself to determine the type of soil involved in support for the new building. He was asked if at this time, his company made any search concerning utilities in the area while making these tests. He responded as follows:

"Q: You were on the location at one or more occasions when they were making these various bore tests?

"A: Yes. I believe I was.

"Q: Now, in order to do your boring, do you not have to find out in the areas where you propose to bore whether or not there is any underground water pipe, gas lines, and various utilities?

"A: We probably do, yes.

"Q: And would this encompass a utility check so that you don't drill through one of the gas mains, or something?

"A. I'd have to check. We are always concerned about that in a general sense. I'd have to check back as to what specifically was done in this instance.

"Q: Normally, would you do this before you made your drills or your borings, check to find out where you were drilling?

"A: We would be concerned as to the presence of utility lines."
(Deposition of Warren Curtis, pgs. 86 and 87.)

It was the employee of Dames & Moore that noticed the crack developing in the alley way as is evidenced by Exhibit 45-P.

Mr. Curtis, upon being informed of the crack, went to the construction site, and made personal observations. He was asked whether or not, after making an inspection of the area, he saw the fire hydrant in question. He answered that he remembered seeing the hydrant but it did not register to him as such. (Deposition of Warren Curtis, pgs. 104 and 105.) Mr. Curtis was also questioned about the procedure of Dames & Moore in making their survey prior to assembling their data.

"Q: And in your prior procedures, have you checked to see if you were drilling into utilities in the alley or would you just go ahead and drill?

"A: Sometimes we would go ahead and drill. I would point out that the process of searching becomes rather expensive, and like every other business, we're on a tight budget, and we have our time rather rigorously sched-

uled, and it is going to take quite a bit of time to chase down utilities so we would exercise judgment as to what might occur. Certainly, if we had reason to believe the utility line might be present, it would be checked out. More often or not, this information is available to us from the people with whom we are dealing."
(Deposition of Warren Curtis, p. 89.)

Warren Curtis, in answer to questions about any inquiries he personally made about utilities, stated

"Q: Did you ever mention to any of Jacobsen's employees, supervisory employees on the job, the extreme importance of a water line being in the alley way after the alley started to crack?

"A: Yes. That is a matter of record.

"Q: I say, did you?

"A: No, I did not personally. Mr. Kochevar was on the job and I asked him to pass that information along.

"Q: So what you are saying today is, then, if it was done, it was done by Mr. Kochevar but not you, is that correct?

"A: That is correct."
(Deposition of Warren Curtis, pgs. 95 and 95.)

Curtis was finally asked:

"Q: I say it would be accurate to say, then, that Dames & Moore relied on Mr. Kochevar's report to them as to his conversations about utilities with others rather than any investigation made on their own?

"A: That is correct."
(Deposition of Warren Curtis, p. 97.)

Steve Jecobsen testified that the employees of Dames & Moore told him there was no water line behind the sheet pile wall. (Deposition of Steve Jacobsen, pgs. 7 and 8.)

Mr. Ralph Wadsworth, then an engineer for F. C. Torkelson Company, and the person directly responsible for designing the support system for the sheet pile wall, was questioned in his deposition about the importance of having data showing the existence of a water main lying behind the sheet pile wall in the alley way. He was asked

"Q: Would that have been a concern of yours if you had known that there was a water line in the area of the wall?

"A: Sure.

"Q: Would it have been a concern?

"A: Well, we'd either have to turn off the water if we could or move the later line or design for the possibility of the water pressure. We have to take this into consideration on design.

"Q: Why is that? Because of a possibility that the line might break?

"A: Yes.

"Q. How might the pipe be broken?

"A: By driving of the piles.

"Q: Did the sheet pile wall that you designed allow for some deflection, some take-up, some movement?

"A: Sure. They all move, sheet piling walls."
(Deposition of Ralph Wadsworth, p. 18.)

He was then asked who provides the data concerning water lines or utility lines near the sheet pile structure for use in his design of the supporting system.

"Q: Do you agree with that, that you would not have designed the support structure that you have discussed here today any differently had you know of this line in the alley?

"A. I would have designed it differently, yes."

"Q: If there is a water pipe or utility pipe near the proposed sheet pile wall, who normally tells you this information so that you can design accordingly to prevent the movement?

"A: Well, depends on the job. If you have a soils engineer (Dames & Moore, emphasis ours), he's the guy that's aware of this.

"Q: If you have a soil test and a soil engineer, they normally then give you the necessary information so that you can calculate the wall to resist movement as you have indicated here today, if there is a water line next to it?

"A: Yes."
(Deposition of Ralph Wadsworth, pgs. 29 and 46.)

Warren Curtis of Dames & Moore stated that he asked his employee, Mr. Kochevar, to inquire of Jacobsen's employees about the existence of any water line in the alley after the crack was noted developing in the alley way. Mr. Kochevar testified that he contacted

Dick Sperry of Jacobsen and informed him that a crack was developing in the alley and then inquired if Mr. Sperry knew of any water lines in the alley to which he replied in the negative. When Mr. Sperry was questioned in his deposition about this alleged conversation, he was asked

> "Q: Well, I'll ask you directly: Did Mr. Kochevar tell you that he had been instructed by Mr. Curtis to warn you that if there was a water line in the alley with the movement that was being experienced, that it would cause a failure of the sheet pile wall because of the hydraulic or hydrostatic pressure?
>
> "A: I did not receive any direct order like that, no, sir.
>
> "Q: Did you have a further conversation then with Mr. Kochevar and report to him that you had checked for the presence of water lines in the alley and found that there were none?
>
> "A: No, I did not."
> (Deposition of Richard Sperry, p. 26.)

When Mr. Kochevar was asked concerning the report made by his employer, Dames & Moore, as to the cause of the failure, he responded as follows:

> "Q: There is a statement in the report that said that the fire line had not been found in the normal identification of utility lines for construction. Do you know what normal identification is?
>
> "A: I think what they are referring to there is *usually we check with utility lines before we*

drill up holes or go on new construction sites to see ifthere are any utility lines." (Emphasis ours.)

He was further asked:

"Q: Your understanding of normal identification then is checking with the city?

"A: Well, city or—I mean, all utility lines, city, power lines, telephone lines."
(Deposition of Kochevar, p. 50.)

In questioning Mr. Kochevar, he recognized that his employer, Dames & Moore, usually check for utility lines with the city and the telephone company, and others as part of Dames & Moore procedure in rendering a soil survey and report. He was asked

"Q: You were concerned then of the possibility that there might be some water lines in the alley that might rupture?

"A: That's correct.

"Q: Would you tell us whether or not, Mr. Kochevar, after you saw the cracking developing in the alley way, whether or not this caused you to be concerned that if there was a water line in the alley way that you might have a rupture of the water line which would cause an undue stress or load behind the sheet pile wall and ultimately result in a failure?

"A: Yes, we were concerned."
(Deposition of Kochevar, pgs. 37 and 45.)

Steve Jacobsen was one of those employees Dames & Moore claim told them there was no water line in

the alley way. When Mr. Jacobsen was questioned about this problem, he testified as follows

"Q: Do you recall any such conversations?

"A: Very definitely not. In fact, I contend that very strongly.

"Q: you deny there was such conversations?

"A: Yes."

(Deposition of Steve Jacobsen, p. 22.)

Both Leo and Steve Jacobsen and Richard Sperry, employees of Jacobsen, stated that they thought the hydrant in the alley way north of the construction site was serviced by a water main coming from the north to the south connecting the main. They did not have any idea that the main line ran behind the sheet pile wall on south to the next street. (See deposition of Richard Sperry, pgs. 60, 61 and 66; deposition of Steve Jacobsen, pgs. 7, 8, 9, 38 and 45; deposition of Leo Jacobsen, pgs. 43-45.)

There are several disputed issues of fact which require a jury determination before judgment can be rendered in the present case. Did Jacobsen have a right to expect that the soil experts hired would furnish all necessary data for use in the design of the sheet pile wall? Did the soil experts have a duty to include in this data information necessary for the structural engineer's determination as to the type of support needed? Did Jacobsen know or should it have known of the existence of the hydrant in the alley way north of the construction site and the fact that it was serviced

by a water main underground running from south to north rather than north to south? When the crack developed in the alley way, was Jacobsen negligent in failing to make further inquiry about the possible existence of utility lines in the alley? Did Jacobsen have a right to rely upon the presence of an employee, an engineer from Dames & Moore, the soil consultants, at the time the fracture occurred and to rely upon his judgment as to any danger that might be posed?

There is a serious conflict in the testimony between the employees of Dames & Moore and those of Jacobsen concerning inquiries made about the water line after the danger developed and before.

This Honorable Court stated in the case of Singleton vs. Alexander, 19 Ut.2nd 292, 431 P.2nd 126, as follows:

> "It will be noted that a summary judgment can be granted only when it is shown that there is no genuine issue as to any material fact and that the moving party also is entitled to judgment as a matter of law under those facts. The court cannot consider the weight of testimony or the credibility of witnesses considering a motion for summary judgment . . . However, when it comes to determining negligence, contributory negligence, and causation, courts are not in such a good position to make a total determination for here enters a prerogative of the jury to make a determination of its own, and that is: Did the conduct of the party measure up to that of the reasonably prudent man, and, if not, was it a proximate cause of the harm done?"

It is respectfully submitted that there are numerous disputed critical issues of fact requiring a trial by jury that cannot be resolved by summary judgment.

POINT II

THE COURT ERRED IN RULING AS A MATTER OF LAW THAT PAYMENT TO JACOBSEN BY ZCMI WOULD NOT DEFEAT RECOVERY BY ZCMI AND COULD NOT BE MADE AN ISSUE AT TRIAL.

The contract entered into between ZCMI and Jacobsen provided that the parties would be governed by the general conditions of the contract and specifically referred to the same. The suit in question was filed in July of 1966. All of the data concerning the cause of the failure of the wall and costs of reconstruction were available to the owner, ZCMI, long before the suit was even filed. Leo Jacobsen was asked in his deposition if he had any arrangement or agreement with ZCMI concerning the settlement of the dispute of the sheet pile wall failure when the job was completed or at any time prior thereto. Mr. Jacobsen affirmatively denied any such agreement. He was asked

> "Q: Well, now, when you submitted this item of some $49,000.00, you expected to be paid I take it?
>
> "A: Yes.
>
> "Q: And did you have any specific understand

ing with ZCMI that even though they paid it that they might come back against you to get it back, did you ever agree to that?

"A: I don't believe that I ever agreed to that. The only thing—I don't believe that I made any statement as to the position we would take in this regard. I was merely advised that suits would be filled to determine liability and that we would probably be named the defendant. And we took no position as to how, whether we were liable or not or whether we would refund or any payment made. There was no statement made along these lines."

(Deposition of Leo Jacobsen, p. 51.)

Mr. Jacobsen left the city on a mission for the LDS Church and was in Europe at the time of acceptance of the job and final payment was made in the late Fall of 1967. Mr. Dean Williams, Secretary-Treasurer of ZCMI and the person in charge of the construction of the new building for ZCMI, testified concerning any arrangements for payment made with Jacobsen on the loss from the wall failure as follows:

"Q: Was there any written agreements with Jacobsen concerning the disposition of the costs in restoring the wall before final payment was made?

"A: No. The law suit had been filed sometime before this and all—we relied upon that to take care of any damages and set out the costs and indicate what we intended to do about geting refund.

"Q: Did you have any agreements with Jacobsen, oral or written, when your final pay-

ments were made concerning how or when or by whom you were to be paid for the damage caused by the failure of this wall?

"A: We relied upon the law suit.

"Q: All right. I just wanted to make sure there was no agreements with anyone about this. Did you have any agreements with anyone else concerning how the store was to recoup its loss for the failure of the wall?

"A: Once again, we relied upon the law suit and the advice of our counsel that he would sue to recover damages.

"Q: Do I understand correctly that your answer is you had no agreement with anyone concerning the moneys lost, and you were relying on the results of your law suit. Is that correct?

"A: That is correct."
(Deposition of Dean Williams, pgs. 14 and 15.)

Mr. Williams also testified in his deposition that he had the benefit of counsel from the day the wall collapsed to the present date and took his attorney to the site as soon as he learned of the wall failure. (Deposition of Dean Williams, p. 9.)

The contract between ZCMI and Jacobsen provides, among other things, under the general conditions of the contract, Article XXVII,

"The making and acceptance of the final payment shall constitute a waiver of all claims by the owner, other than those arising from unsettled liens, from faulty work appearing after

> final payment or from requirement of the specifications, and of all claims by the contractor, except those previously made and still unsettled." (Exhibit p. 54)

In the instant case, the payments were made to Jacobsen in full for all costs of construction and for its profit on the job well over one year after the law suit was filed.

A contract providing for approval of the architect and for waiver of any further claims by final payment is binding. See 13 AmJur 2d, Building Contracts, Sections 32 and 34. The author therein states

> "It is also clear that where the parties stipulate, expressly or in necessary effect that the determination of the architect or engineer shall be final and conclusive, both parties are bound by his determination of those matters which he is authorized to determine, except in case of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise honest judgment."

In the instant case the plaintiff employed experts to report on the apparent cause of the failure of the wall and thereafter, with all of this information, including the depositions taken in this case, paid Jacobsen in full with no contingency, reservation, or other agreement. Such constitutes payment and a waiver of any further existing claims by virtue of the contract and the common law. See 40 AmJur, Payment, Section 174, wherein the author states that where a party litigant has full knowledge of the facts but nevertheless voluntarily

pays a part or all of the demand and the court thereafter rules that such defendant did not owe any or part of the demand, he could nevertheless not recover back his payment. See, also, the case of Teamsters Local Union No. 222 vs. W. S. Hatch Company, 20 Ut.2nd 226, 436 P.2nd 790, wherein Justice Ellett in his dissenting opinion correctly states the law as follows:

> "When payment is thus voluntarily made, it cannot be recovered, either from the recipient or from the one who demanded that the payment be made.
>
> "The law is set forth in 40 AmJur, Payment, as follows: Sec. 155. 'Payments which are voluntarily made cannot be recovered but recovery may be had of payments made as the result of duress, fraud, mistake, or failure of consideration. In fact, it has been said that these are the only grounds upon which a suit to recover back money paid may be maintained." * * * *"

ZCMI certainly did not make any payment to Jacobsen as a result of any duress as the payments were made after the building was completed and they had occupied the same. There was no fraud exercised or claimed by anyone nor is there any mistake involved as ZCMI had full knowledge of all of the evidence, including legal counsel, from the moment of the failure of the wall to the present date. It is the position of Jacobsen that this Court should rule, as a matter of law, payment in the above matter constitutes a termination of all the rights of the parties involved and that summary judgment in favor of Jacobsen should have

been granted on this issue. In any event, there certainly are issues present precluding summary judgment in favor of ZCMI.

CONCLUSION

Warren Curtis of Dames & Moore testified that it was not his company's job to locate utilities. The report rendered by Dames & Moore to ZCMI on the cause of the failure of the wall indicates a lack of a location of the utilities. Dames & Moore's employee, Lewis Kochevar, testified that usually Dames & Moore located all utilities before it commenced its work on a project. The design engineer that prepared the drawings for the support of the sheet pile wall, based upon the data furnished by Dames & Moore, testified that it was the soil engineer's duty to locate utilities and so inform him if one was present so he could design a wall to meet this hazard. Dames & Moore's employee, Warren Curtis, said that his company made inquires of Steve Jacobsen and others from Jacobsen Construction Co. about the existence of any utilities and were told that none existed. Jacobsen's employees emphatically denied these inquiries but to the contrary, Steve Jacobsen testified that he was told by Dames & Moore personnel that there were no utility water lines in the alley behind the wall.

The obvious conflicts in the testimony of the witnesses involved present material issues of fact precluding summary judgment against Jacobsen.

The trial court, in its Memorandum Decision, referred to a provision in the contract regarding third party liability insurance and, in spite of the fact that no one presented insurance as as issue, gave considerable weight to this provision in rendering a decision herein. Any liability insurance for property damage to others resulting during the construction of the building obviously has no application under the instant facts (R-384).

The Memorandum Decision of the trial courtdenied plaintiff's Motion for Summary Judgment as to all defendants except Jacobsen, with all of the factual issues, including Jacobsen's right to recover over against Dames & Moore on a cross-complaint being left open to trial by jury. It is respectfully submitted that there are numerous disputed material issues of fact regarding liability that preclude summary judgment against Jacobsen. The facts should be submitted to a jury for determination.

It is respectfully submitted that this Court should grant Jacobsen's Motion for Summary Judgment against ZCMI based upon the theory of payment, or in the alternative, for a reversal of the lower court's Order of Summary Judgment against Jacobsen and for a trial of all of the issues of fact to a jury, including the issue of ZCMI's payment after the filing of this law suit.

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