

1959

Harris Bethers v. Lalif Wood dba Industrial Construction Co. : Brief of Defendant and Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

HARRIS BETHERS,
Plaintiff and Respondent,

vs.

LALIF WOOD, dba
INDUSTRIAL
CONSTRUCTION COMPANY,
Defendant and Appellant.

FILED
In Supreme Court
Case No. 9062

BRIEF OF DEFENDANT AND APPELLANT

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HARRIS BETHERS,

Plaintiff and Respondent,

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INDUSTRIAL

CONSTRUCTION COMPANY,

Defendant and Appellant.

} Case No. 9062

BRIEF OF DEFENDANT AND APPELLANT

NATURE OF CASE

Plaintiff sought to recover the sum of \$29,009.90 claimed due him for the performance of a subcontract entered into between himself and the defendant, whereby the plaintiff undertook to furnish gravel required in the construction of a highway from East Paria Creek, Utah, to Utah-Arizona State Line. The defendant was at the time under contract with the Utah State Road Commission to build the road in accordance with the provisions of a prime contract.

Defendant counterclaimed and alleged a right of set-off for a sum in excess of the claim made by the plaintiff by reason of plaintiff's default, arising from his delay in furnishing the gravel as directed by defendant and as set forth in the contract.

During the course of trial, while defendant was presenting his case, the court ruled as a matter of law that the subcontract prevented defendant from asserting any damages by way of counterclaim.

STATEMENT OF FACTS

On January 16, 1957, defendant, doing business as Industrial Construction Company, entered into a contract with the Utah State Road Commission, wherein he undertook to construct a bituminous surfaced road in Kane County, State of Utah, between nine miles east of Paria Creek and the Utah-Arizona State Line, identified as Project No. F. L. P. 31 (1) and S. P. 1583, of approximately 12.041 miles in length. Under the terms of the contract, defendant agreed to furnish labor and materials for the construction of the road in accordance with the drawings, plans, and specifications and addendums attached to and made a part of the contract, all as set forth in Exhibit 10.

On the 17th day of January, 1957, defendant entered into a subcontract with plaintiff, Harris Bethers, whereby the latter undertook and agreed

to furnish the gravel required in the construction of the highway. (Exhibit P-1).

Since some of the provisions of that contract are in dispute, they will be set forth at length for the purpose of future reference. Section 3 of the contract provides:

“The subcontractor agrees to complete the several portions and the whole of the work herein sublet by the time or time following: (Here insert the date or date and if there be liquidated damages, state them.)

“Delivery of materials to keep up as directed, behind grading equipment at all times. Should contractor have to assume charge on account of delay by subcontractor, the expense accrued therein will be deducted from the contract price. Contractor to receive gravel at site of crushing plant in the bin.”

Section 5 provides:

“The contractor and subcontractor agree to be bound by the terms of the Agreement, the general conditions, drawings, and specifications as far as applicable to this subcontract, and also by the following provisions:
* * * The contractor agrees —

“(k) to make no demand for liquidated damages or penalty for delay in any sum in excess of such amount as may be specifically named in this subcontract.

“(1) That no claim for services rendered or material furnished by the contractor to the subcontractor shall be valid unless written notice thereof is given by the con-

tractor to the subcontractor during the first ten days of the calendar month following that in which the claim originated."

Upon signing the subcontract, defendant instructed the plaintiff as to the manner in which gravel was to be supplied in order that deliveries of materials would be kept up to the grading equipment (T. 134-135). Plaintiff informed the defendant that he would be on the job ready to crush gravel in approximately one week from the date the subcontract was signed, January 17, 1957 (T. 137). Plaintiff did not move the gravel crusher onto the job until approximately March 4, although defendant began preparing the grading operation one month previously (T. 58). At the time the crushing equipment arrived, approximately 20 per cent of rough grading had been completed by plaintiff (Exhibit 15, Weekly Report No. 5). Although the contract specified that defendant was to receive the gravel supplied by the contractor at the site of the crushing plant in the bin, the bin was not supplied by the plaintiff until April 4, 1957, (T. 61), which required defendant to employ additional equipment in order to handle the gravel as it was crushed (T. 63). The defendant was to supply scales for weighing the gravel before placing it upon the road bed; and although the scales were not placed at the job site until sometime between February 25, 1957, and March 4, 1957, (T. 100-

131), the defendant testified that he could have had scales available on 48 hours' notice but didn't bring them to the job site until plaintiff determined where he was going to set his crusher. The scales weighed between 15 and 20 tons, and plaintiff wished to avoid unnecessary handling (T. 131-132). Mr. Hilton, the State Resident Engineer, testified that, if the crusher had been in operation before the scales arrived, the gravel supplied could have been stockpiled and then weighed before placing it on the road (T. 122).

Considerable evidence was introduced tending to show the manner in which the construction of the road was to proceed, through Mr. Hilton, Resident Engineer for the State of Utah, (T. 76-7) and also by Mr. Wood (T. 136). Mr. Wood, on numerous occasions, directed the plaintiff to produce gravel at a faster rate so that it could be kept up with the grading equipment (T. 59, 139-140, 144, 149, 151, 152, and 153). By June 28, 1957, the grading phase of the construction had reached a point where the entire grade of the roadbed was in a condition to receive all of the gravel (T. 86). At that time the production of gravel was approximately four miles behind the grading, although the evidence indicated that the gravel could reasonably be expected to keep within 500 to 1000 feet of the grading equipment (T. 151-152). Mr. Wood testified that had the

gravel been supplied pursuant to his instructions and directions to the plaintiff, that he had the equipment standing available to lay it; and that the road would have been virtually complete at that time except to mix and lay oil and the "applying of chips and final clean-up" (T. 155-156).

Under the terms of the contract, plaintiff was required to supply three types of gravel. However, none of the gravel items were fully supplied until August 10, 1957, when the gravel base item was completed (Exhibit 15, Report 29).

On the 4th day of December, 1957, the parties entered into an Agreement for the purpose of "completing two items covered by this contract (of January 17, 1957), without affecting the rights of either of said parties under the terms of the contract dated January 17, 1957" (Exhibit 4).

On December 21, 1957, defendant terminated plaintiff for his failure to meet the schedule set forth in the Supplemental Agreement of December 4, 1957. In this connection the trial court found that "on or about the 23rd day of December, 1957, the defendant took over performance of the said Supplemental Agreement and incurred expenses in procuring gravel from other sources, which expenses have been charged against the contract price due plaintiff" (T. 162).

During the course of defendant's case, the court, on motion of plaintiff's counsel, took under consideration the effect of Section 3 of the Subcontract, as well as Subsections (k) and (l) of Section 5 of the contract (T. 157 and 158). The court ruled as a matter of law that the defendant was not entitled to claim damages as asserted in his counterclaim by reason of these sections as more fully appears from the Conclusions of Law made and entered by the court herein (T. 164). Judgment was entered for plaintiff in the sum of \$27,082.62, with interest in the amount of \$2,349.71, and costs.

STATEMENT OF POINTS

POINT 1.

THE COURT ERRED IN RULING AS A MATTER OF LAW THAT THE PROVISIONS OF THE SUBCONTRACT AND PARTICULARLY SECTION 3 AND SECTION 5 PRECLUDED THE DEFENDANT FROM ASSERTING THE ALLEGED DAMAGES AS SET FORTH IN THE COUNTERCLAIM AND DISMISSING DEFENDANT'S COUNTERCLAIM WITH PREJUDICE.

- A. Damages resulting from delay in performance of a contract, or failure to perform it within the time agreed, is the actual loss sustained by reason of the delay.
- B. Section 3 of the contract does not provide an exclusive remedy of defendant, and taking over of the supplemental contract by defendant did not constitute a waiver of his right to assert damages against plaintiff, which arose from delay.
- C. Section 3 of the contract does not make provision

for liquidated damages, as referred to in Section 5 (k). Thus, the basis for computing damages is the actual damage suffered by defendant by reason of the delay.

- D. Section 5 (1) does not require defendant to give notice to plaintiff for damages sought for delay in performing the contract.

POINT II.

THE COURT ERRED IN FINDING THAT PLAINTIFF FURNISHED GRAVEL TO THE DEFENDANT IN ACCORDANCE WITH THE REQUIREMENTS OF THE SUBCONTRACT AND THAT PLAINTIFF SUBSTANTIALLY PERFORMED ALL OF THE COVENANTS AGREED BY HIM TO BE PERFORMED.

ARGUMENT

POINT I.

THE COURT ERRED IN RULING AS A MATTER OF LAW THAT THE PROVISIONS OF THE SUBCONTRACT AND PARTICULARLY SECTION 3 AND SECTION 5 PRECLUDED THE DEFENDANT FROM ASSERTING THE ALLEGED DAMAGES AS SET FORTH IN THE COUNTERCLAIM AND DISMISSING DEFENDANT'S COUNTERCLAIM WITH PREJUDICE.

- A. Damages resulting from delay in performance of a contract, or failure to perform it within the time agreed, is the actual loss sustained by reason of the delay.

There appears no serious disagreement with the general rule of law that the measure of damages for delay in the performance of a contract or the failure to perform it within the time agreed upon is the actual loss sustained by reason the

delay. 15 Am. Jur., Damages, Sec. 47; *U. S. v. Smith*, 94 U. S. 214, 24 L. Ed. 115; *U. S. v. Muller*, 113 U. S. 153, 5 S. Ct. 380, 28 L. Ed. 946; *Sprague v. Boyles Bros. Drilling Co.*, 294 P. 2d 689, 4 Utah 2d 344 (1956).

No limitation appears to be placed upon the nature of the damage resulting from delay in the performance of a contract for which recovery can be had, provided the claim is proved by satisfactory evidence.

In the instant case, the defendant sought to claim and recoup against the agreed price the actual damages sustained by him by reason of defendant's delay. This, in effect, was the point at issue in the case of *Wisconsin Bridge & Iron Co. v. City of Alpena*, 238 Mich. 164, 213 N. W. 93 (1927), where the plaintiff contracted with the defendant city to build a bridge and submitted two bids showing different prices for different completion dates. The city accepted the higher bid for faster completion. The contract did not stipulate damages for delay, and the contract was not performed within the agreed time. The city withheld approximately \$2,000.00 of the contract price, which it claimed as damages resulting from the delay. The plaintiff sued, and the city defended, claiming recoupment, and a jury returned a verdict in favor of the city based on the difference between the original two bid prices.

The Appellate court reversed the jury award because the remedy under the low and unaccepted bid exacted a penalty and was not an "admeasurement of damages."

The court then said:

"If a contract provides no remedy by way of liquidated damages, then damages in recoupment of the contract price must be established by evidence showing actual damages and the amount thereof. * * * Failure of plaintiff to perform within the time fixed in the contract gave the city the right to claim and recoup against the agreed price the actual damages sustained; such damages, if any, to be established only by evidence showing the nature and extent thereof."

The foregoing case followed the established principle of law in the absence of a provision in the contract for liquidated damages.

In the instant case the court denied the defendant the opportunity of proving his actual damages, or of even stating a claim in recoupment against the plaintiff, and ruled as a matter of law that the subcontract Sections 3 and 5 (k) and (l) precluded him from asserting any claim for damages against the plaintiff.

Section 3 of the Subcontract provides:

"The subcontractor agrees to complete the several portions and the whole of the work therein sublet by the time or times following:

(Here insert the date or dates; and if there by liquidated damages, state them.)

"Delivery of materials to keep up as directed, behind grading equipment at all times. Should contractor have to assume charge on account of delay by subcontractor, the expense accrued therein will be deducted from the contract price. Contractor to receive gravel at site of crushing plant in the bin."

This subsection of the contract is in part the language of the parties and in part the standardized language of the Standard Form of Subcontract as approved and copyrighted by the American Institute of Architects. A reading of the entire contract clearly indicates that assuming control of the subcontract was not stated as, nor intended to be, the exclusive remedy of the contractor in the event the plaintiff subcontractor fell into default, in supplying the material as directed by defendant.

It is an established principle of law that when work is to be done by a time certain, the party for whom the work is to be done, by allowing it to continue after that date, treats the contract as still in force, but waives the materiality of time. Such does not constitute a waiver of his right to damages sustained by reason of the delay.

The early case of *Sinclair v. Talmadge*, 35 Barb. 602 (N.Y. 1861), adopted this rule of law and it has been generally applied by the courts throughout America. There the plaintiff had con-

tracted to build certain stores for the defendant, which were not completed within the time specified. Upon the defendant's refusal to pay a portion of the final installment, suit was instituted by him to recover the unpaid portion. The court stated, page 606:

"The defendants, by suffering the plaintiffs to go on after the time limit, and complete the buildings, waived for forfeiture, which they might have claimed had they exacted it on the day. It was the right of the defendants to rescind the contract after the day upon which the work was to have been done; and had they done so, the plaintiffs could not have recovered for the work done. But both parties, after that treated the contract as still in force, and the plaintiff was suffered to go on under it, and the claim of the defendants is now limited to damages for nonperformance as to time, and this claim has been allowed them." See also *Foster v. Worthington*, 2 N. Eng. R. 474, 59 Vt. 65.

A similar situation existed in the case of *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417 (1888), where the contractor agreed to furnish and cut stone for the construction of certain buildings. The specifications for the buildings were later altered by the owner in violation of the contract so as to require the building then remaining unconstructed to be built of brick and merely trimmed with stone. The court observed:

"It is undoubtedly the rule that where

one party to a contract breaks the same, the other party may stop and refuse further performance. But, instead of doing so, he may perform so far as he is permitted, and then claim the damages he has suffered from the breach. Here the contractors furnished and cut the stone for the trimmings, not under a new contract, but under and in performance of the original contract, and for the prices therein mentioned, and this they could do without any ratification of the modification of the contracts attempted by the State.

“Further, the fact that a party continues to perform a contract following a breach by the other party, carries with it no presumption that there was a waiver of his right of action for the breach of the contract, by the mere fact that he proceeded with the work after the breach.” *Markey v. Milwaukee*, 76 Wisc. 349, 45 N. W. 28 (1890).

In a case which is strikingly similar to the one at bar, a subcontractor sought to recover for railroad construction work from the general contractor. The general contractor claimed the right to set off the expense of doing certain work which exceeded the amounts owing the subcontractor in regard to which the subcontractor was in default under the terms of his contract, and also under an agreement for an extension of time. The court, in holding that the general contractors were entitled to the set off said:

“As to the retained percentage, it would seem that, by the express terms of the con-

tract between Sands and Oliver and Quigg, they had the right of set-off, for the contract says: 'The said retained percentage to be held by the contractor as a guarantee for the faithful performance of his contract as herein stipulated.' But upon general principles governing the right of set-off, independently of the terms of the contract, Sands & Oliver had the right to have allowed in their favor any demand they might establish against Quigg for breach of his contract with them." *Sands v. Quigg*, 111 Va. 476, 69 S. E. 440 (1910).

The U. S. Supreme Court recognized this rule in the case of *Dermott v. Jones*, 23 How. (U. S.) 220, 16 L. Ed. 442. The defendant had engaged the plaintiff to build a building and the contract called for installments of \$5,000.00 to be paid July 1, 1851; another installment of \$5,000.00 to be paid October 1, 1851; and a final payment of \$14,000.00 was to be paid January 1, 1860. The building was to be ready for use October 1, 1851. An action was brought to recover the second installment of \$5,000.00, which was not paid by October 1, 1851, and the answer denied that the building was ready for use on the due date. The testimony in fact showed it was completed and accepted December 4, 1851.

"In such a case, the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration of it. Still, if the other party has derived any benefit from the labor done, it would be unjust to allow him to retain

that without paying anything. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred is really worth . . ." See also *Phillips Construction Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341, where the court found that urging a builder to go on and the making of part payment after failure constitutes a waiver of the strict performance as to time.

Thus, in the case before the court, the maximum amount the plaintiff is entitled to recover is the actual net benefit, if any, resulting to defendant, which is the contract price, less the amount of damage occurring to defendant, by reason of plaintiff's delay in performance.

A summary of the law on this point is contained in *Williston on Contracts*, Section 699 (Rev. Ed.).

"Many cases have arisen where builders and contractors have failed to complete the agreed work by the time fixed in the contract If after the time has already elapsed, the owner permits the builder to continue to work, even if the contract or materiality of the breach gave the owner power to terminate the contract on such a contingency, his conduct is an election to go on with the contract rather than to forfeit it, and on the completion of the work the owner is liable for the price, though he is entitled to a cross claim for any damages caused by the delay." (Citing cases).

"The true measure of recovery is the sum stipulated in the agreement, less the

damages sustained by the failure strictly to perform. The principle underlies all decisions involving consideration of the proper rule for ascertaining the amount recoverable in cases of substantial performance of contracts for services or for the furnishing of materials. All the decisions are referable to the underlying principle that the party in default can never gain by his default, and the other party can never be permitted to lose by it." 58 Am. Jur., Work & Labor, Sections 53 and 54.

In the instant case, plaintiff's constant refusal to "catch up with the contract" by supplying sufficient gravel materials to permit the graveling portion of the operation to maintain pace with the grading aspect of the road construction gave the defendant two alternatives. First, he could have terminated the contract and engaged another to perform it; and under the terms of the contract, Section 3, which merely stated the general rule of law, the additional expense in so doing could have been deducted from the contract price. Second, the defendant could permit the plaintiff to continue with his contract. Under the principle of law discussed above, defendant would then waive the materiality of the time of performance, but would be entitled to offset the damage resulting to himself by reason of the delay against any amounts which became due for performance under the contract.

It should be noted in this case that the segment of road which was being constructed was in a remote

area of the State, and the defendant was undoubtedly faced with a practical problem in obtaining gravel to complete his contract for the State of Utah. The fact that he permitted the plaintiff to remain on the job and produce gravel at a rate substantially less than contemplated by the parties, did not constitute a waiver of his right to claim damages by reason of that delay. As indicated above, the plaintiff cannot take advantage of his delay in performance, and the defendant should not be permitted to lose by it.

- B. Section 3 of the contract does not provide an exclusive remedy of defendant, and taking over of the supplemental contract by defendant did not constitute a waiver of his right to assert damages against plaintiff, which arose from delay.

Apparently the trial court was of the opinion that Section 3 of the Subcontract provided an exclusive remedy of defendant in event of delay by plaintiff in the performance of his contract. It should be noted that a Supplemental agreement was entered into between the parties December 4, 1957, (Exhibit 4), for the stated purpose of completing two items covered by their original contract of January 17, 1957, "without affecting the rights of either of said parties under the terms of the contract . . ." The plaintiff failed to perform the supplemental contract and defendant terminated it and took over its performance. This action did not waive his right

to look to plaintiff for the damage he had suffered by reason of the delay in performing under the original contract of January 17, 1957.

The failure to properly analyse the rights of the damaged party as a result of delay in the performance of a contract was considered in the case of *Frankfort-Barnett Co. v. William Prym Co.*, 237 F. 21, 28, 29 (2nd Cir. 1916).

The defendant had agreed to supply fasteners to the plaintiff by a certain date and failed to do so. The parties entered into a later agreement, whereby the plaintiff agreed to accept delivery of a quantity of fasteners according to the terms of the original contract. The question presented for the appeal court was whether or not the plaintiff waived his right as pertained to the original breach by reason of the defendant's failure to deliver the fasteners under the earlier contract. The court held that there was not such a waiver.

“The difficulty in this case has grown out of the failure to distinguish between the waiver of a right to treat a breach of the contract as a discharge of the contract, and a waiver of the right to recover the damages occasioned by the breach. The two rights are distinct and must not be confused. In Page on Contracts, Vol. 3, Sec. 1509, that writer correctly says that waiver of the right to treat a breach of contract as a discharge of contract liability may take place without a

waiver of the right to maintain an action for damages, and the weight of authority is that it is not such a waiver. And in Section 510, the same writer states that acceptance after breach is not a waiver of right of action is apparent when it is considered that the party not in default is often constrained by his necessities to take what he can get under his contract when he can get it.

“The September agreement as set forth in the reply did not supersede the April contract. That remained unchanged. But the plaintiff by agreeing that the defendant might deliver in September the fasteners which he was bound to deliver in April, May, and June, simply waived his right to terminate the contract and to decline to receive any deliveries in September or at any time thereafter; provided the defendant made the subsequent deliveries as then promised. There certainly was no intention on the plaintiff's part to do more than that, and he still had his right of action for the damages he had suffered by the failure to deliver as promised in the April agreement. Such we believe to be the law in this country generally”

A case with striking similarities to the one at bar, both as to the relationship between the parties and the language of the contract, was before the Wisconsin Supreme Court in *Gillen Co. v. Parker Co.*, 170 Wis. 264, 171 N. W. 61, 174 N. W. 75 (1919).

The defendant, Parker Company, was a general contractor who undertook to remove certain build-

ings in the city of Milwaukee. A number of subcontracts for doing part of the work were let, including one such to plaintiff for pile driving and work incidental thereto. The plaintiff's contract of January 13, 1916, required the work to be started under it on or before January 14, 1916, and to be completed by February 16, 1916. The contract provided in part as follows:

"Should the subcontractor be obstructed or delayed in the prosecution and the completion of the work by the neglect, delay, or default of any other subcontractor, . . . then there shall be an allowance of additional time beyond the date set for the completion of said work; . . . and the general contractor shall award the additional time to be allowed . . .

". . . the general contractor shall have the right, at any time, to suspend the whole or any part of the work herein contracted to be done without compensation to the subcontractor other than extending the time for completing the whole work for a period equal to that of such suspension."

The work was not completely finished until August 26. The plaintiff subcontractor claimed certain damages, including additional labor costs, extra liability insurance, extra expense of operation of the steam launch, extra fuel, cost for additional lines used on drivers, for towing of defendant tugs, and other charges. Plaintiff had judgment below,

and the defendant appealed, assigning as error the allowance of damages, claiming that the contract between the parties, and particularly the provisions cited above, provided that the only remedy the plaintiff might have for any delay caused by defendant was limited solely to an extension of time to be given the plaintiff for the completion of the work beyond the time stipulated in the contract.

The court rejected this contention in the following language:

“The general rule therefor applied, that where labor and material are to be furnished and rendered by the one party and to be paid for by the other, and the one furnishing the work, labor, or material is dependent to some extent upon the other party performing his part or providing for the prompt performance by others of a portion of the work, there arises by implication an obligation on such person, situated as is the defendant here, not only to refrain from doing that which will interfere or impede the contractor in the performance of his part, but that it will also do all that which is reasonably necessary in order to enable the contracting party to so perform. For a failure in either respect, damages can properly be awarded to the person so delayed or impeded.” (Citing cases) (P. 67.)

Similarly, in the case of *American Concrete Steel Company v. Hart*, 285 F. 322, 327 (2nd Cir. 1922), Hart brought an action against the American Concrete Company to recover approximately

\$13,000.00 under the terms of a contract between the parties to do excavation work in connection with the erection of a building on Staten Island. The third cause of action was based upon a breach of a provision of the contract providing for damages in event of delay; the fourth cause of action was based upon a breach of an implied agreement by American Concrete Steel Company not to hinder or delay Hart in the prosecution of his work. The District Court found the issues in favor of Hart upon both causes of action.

Although Hart agreed, in a portion of the contract which was written into a form contract, to perform in such a manner as to cause no delay in the construction of the building, and the printed form portion of the contract provided that where Hart delayed in the performance of his contract by defendant, the time for performance would be extended providing timely application was made. It was further mutually agreed that if either party suffered loss through delay of the other, reimbursement would be made.

The defendant claimed the two provisions of the contract relating to delay were repugnant and should be ignored by the court. In this connection, the court in upholding the right of plaintiff to recover damages for delay, observed as follows:

“ . . . The contract was drawn by laymen,

who probably took the printed form for granted, and did not realize the controversy which it might provoke. Ordinarily a contract states a date or a period of time upon or within which it is to be completed; but no such precise limitation is found in the contract.

“When a contract does fix a date or period of time, these two clauses are readily reconcilable. The first provision is designed to extend the time for the completion of the contract by the contractor in case of delay caused by an owner, an architect, or others than himself mentioned in the contract. The second provision affords to each of the parties the right to be reimbursed for such damages as may be suffered by the delay of the other. That such provisions are not repugnant seems to be settled by *Guerini Stone Company v. Carlin*, 240 U. S. 264, 36 S. Ct. 300, 60 L. Ed. 636, and *Genovese v. Third Avenue Railway Co.*, 13 App. Div. 412, 43 N. Y. Supp. 8 affirmed, 162 N. Y. 614, 57 N. E. 1108.”

The purpose of including in the contract the remedy of the nondefaulting party is important in determining the intended meaning. In the case of *Nelson v. Pickwick Associated Company*, 30 Ill. App. 333 (1889), the parties entered into a contract by which the plaintiff undertook to do painting and glazing of a building being erected for the defendants. The specifications provided that the work was to be completed on a day certain, and was to be done so as not to delay other co-operating contractors. The following provision was included in the contract:

“Should delay be caused by other contractors to the positive hinderance of the contractor hereto, a just and proper amount of extra time shall be allowed by the architect . . .”

Judgment was entered in favor of plaintiff for damages resulting from defendant's delay.

The question presented on appeal was whether or not the “extra time” was the only and exclusive remedy of plaintiff when he was delayed by other contractors. The court held that it was not. The provision in the contract was for the plaintiff's benefit and provided for an allowance of additional time to him but was not in deprivation of his rights to require the work to be done in readiness for him.

See also the case of *Mason Tire and Rubber Co. v. Cummins-Blair Co.*, 116 Ohio St. 554, 157 N. E. 367 (1927), where plaintiff was permitted to recover damages resulting from delay even though a provision for extension of time was included in the contract.

The provision, in the subcontract in the present case, authorizing defendant to withhold money from plaintiff in the event defendant found it necessary to assume control because of delay by the plaintiff in supplying gravel for the construction of the road, was obviously written for the benefit of defendant to give him control of the project, and to enable him to perform his prime contract with the

State of Utah. The provision was intended as an additional remedy and was "not in deprivation of his rights".

- C. Section 3 of the contract does not make provision for liquidated damages, as referred to in Section 5 (k). Thus, the basis for computing damages is the actual damage suffered by defendant by reason of the delay.

On the basis of the trial court's ruling there was implied a determination that liquidated damages were set forth in the subcontract. It will be helpful to refer again to Section 5 of the subcontract, which provides:

"The contractor and subcontractor agree to be bound by the terms of the agreement, the general conditions, drawings and specifications as far as applicable to this subcontract, and also by the following provisions:

"The contractor agrees:

"(k) To make no demand for liquidated damages or penalty for delay in any sum in excess of such amount as may be specifically named in the subcontract."

This language is included in the printed form of the contract. The entire subcontract was not written by an attorney who was acquainted with the technical usage of terms as used in the printed form, but by laymen. The only provision in the subcontract even referring to liquidated damages is set forth in Section 3, which has been quoted above. That reference is one in small type inserted in

parentheses which reads: "(Here insert the date or dates, and if there be liquidated damages, state them)." Section 3 makes no attempt to set forth liquidated damages, nor was there any intention to include such. The prime contract had contained in it a provision for liquidated damages which would be applied against the contractor (defendant). However, there was no mention in the subcontract of liquidated damages or penalty which was to be included in it. This becomes even more apparent when cases are consulted which define the nature of liquidated and unliquidated damages. A technical construction of the typewritten language as contained in Section 3 of the contract, does not indicate a provision for liquidated damages.

"Damages are said to be liquidated when they can be determined from the contract itself, or from the contract and the rules of law applicable thereto, and where it is necessary to introduce evidence before plaintiff can prove his case, the damages are said to be unliquidated." *Lepman & Haggie v. Interstate Produce Company*, 205 Ill. App. 270 (1917).

A rather complete discussion of liquidated damages is contained in the case of *Cockrane v. Forbes*, 267 Mass. 417, 420, 166 N. E. 752, 753:

"Liquidated damages 'mean damages, agreed upon as to amount by the parties, or fixed by operation of law, or under the correct applicable principles of law made certain

in amount by the terms of the contract, or susceptible of being made certain in amount by mathematical calculations from factors which are or ought to be in the possession or knowledge of the party to be charged. Unliquidated damages are those which cannot thus be made certain by one of the parties alone.' "

In the case of *Placealla v. Robbio*, 47 R. I. 180, 131 A. 647 (1926), suit was brought by a father and a son as building contractors for a balance of \$4,000.00 due on a contract and for the reasonable worth of "extras." Defendants sought to recoup certain lost rentals, and these with the extras, were the only items on which the testimony conflicted. There was no dispute as to the balance due on the contract, and the amount to which defendants were entitled for payments made on behalf of plaintiffs. The trial resulted in a general verdict for the plaintiffs in the approximate sum of \$2,200.00, whereas they had claimed a balance due of \$2,800.00. The defendants moved for a new trial, averring that the verdict was against the law, against the evidence, and that the amount was excessive.

" . . . Plaintiff's claim, being contractual, is not, as argued, one for liquidated damages. It does not arise out of any express agreement as to the value of the work done. It arises from the implied obligation to pay what the extras are reasonably worth. The damages are unliquidated. 'Liquidated dam-

ages are those whose amount has been determined by anticipatory agreement between the parties.' 'Unliquidated damages are those not so fixed but determined after they have resulted.' Cyc. Law Dictionary, p. 221; Bouvier Law Dictionary.

"Plaintiff's damages were made upon a group of items, some or all of which might be valid in whole or in part, and the amount of a reasonable charge for which, in many instances, was a matter of dispute. . . . In point of fact, plaintiff's verdict is for the total of the items supported by a preponderating evidence. The trial court's result, as well as that of the jury, can be reached only by determining the amount of each item so supported by the evidence and by adding the several items together . . ."

In the case of *Duncan Lumber Company v. Leonard Lumber Co.*, 332 Ill. 104, 163 N. E. 416 (1928), the plaintiff company sought and obtained a judgment for approximately \$1,200.00 for lumber sold to the defendant. Defendant filed a claim of set-off, although not disputing the liability for the claim sued on but alleged that prior to the sale for which recovery was made, plaintiff contracted to sell and deliver to defendant certain other lumber; and thereafter plaintiff refused to deliver the lumber, and defendant was compelled and did purchase in the open market lumber of the same grade and quality in the same amount, paying a sum of approximately \$4,000.00 more than the contract price, leav-

ing a balance due to defendant after deducting plaintiff's claim of approximately \$2,700.00. The set-off was not allowed and judgment was accordingly entered for the plaintiff. Under the statutes of Illinois, set-offs, where liquidated were authorized.

The trial court held that the damages claimed as set-off were unliquidated and could not be set off in an action at law. In this connection the court stated at page 416:

"Defendant contends its claim of set-off is the difference between the market value of the lumber at the time the contract was breached and the price agreed to be paid for it, without any claim of special damages, and that damages claimed are liquidated. . . . Defendant contends that the damages sought to be recovered by it in its set-off are liquidated damages and cites two decisions of the appellate court that if damages can be ascertained by computation or calculated, they are liquidated. This question has been passed upon by this court in numerous of the cases first above cited. Bouvier was quoted as defining 'liquidated damages' to be a certain sum due, and that it must appear not only that something is due but also how much is due, or the debt is not liquidated. 'An unliquidated debt is one which one of the parties cannot alone render certain.' " See also *Higbie v. Rust*, 211 Ill. 333, 71 N. E. 1010, to the same effect.

Any damages resulting to defendant had he assumed control of the subcontract would have required the introduction of testimony to the same extent as would be necessary for the defendant to

prove his actual damages. According to the standard set out in the foregoing cases, there could not be liquidated damages, since there was not agreement as to the value of the work to be done, nor would the claims be susceptible of being made certain in amount by mathematical calculations or by one of the parties alone.

Liquidated damages were not intended or provided in the contract.

D. Section 5 (1) does not require defendant to give notice to plaintiff for damages sought for delay in performing the contract.

Section 5 (1) of the subcontract does not require defendant to give notice for damages sought through delay but only for materials supplied and work performed. The particular subsection states as follows:

“That no claim for services rendered or materials furnished by the contractor to the subcontractor shall be valid unless written notice thereof is given by the contractor to the subcontractor during the first ten days of the calendar month following that in which the claim originated.”

As pointed out above, the trial court ruled as a matter of law that this subsection construed in connection with Section 5 (k) and Section 3 precluded the defendant as a matter of law from asserting damages by way of counterclaim.

Since the language used; namely, services rendered, or materials furnished, are not technical in their nature, the ordinary usage of these words is controlling.

In this connection the case of *State of Colorado v. United States*, 219 F. 2d 474 (10th Cir., 1954) is helpful. There the United States sought to recover certain fees and penalties from the State of Colorado for services rendered in establishing identity of ownership of livestock. The plaintiff argued that such constituted "stockyard services" within the Packers & Stockyards Act. The court stated:

"The term 'stockyard services' is broad and comprehensive. Webster's New International Dictionary defines a service as 'any result of *useful labor* which does not produce a tangible commodity.' " (Emphasis added.)

The defendant's damages as asserted and set forth in his counterclaim include such items as the cost of maintaining standby equipment amounting to some \$12,000.00, additional wages to employees, including pay roll and taxes and insurance in the sum of \$13,138.90, and equipment rentals which were paid by the defendant which were additional expenses accruing to him, which would have been unnecessary had the plaintiff performed within the time specified in the subcontract. It is to be noted that these items are not the result of "useful labor". The very fact that defendant is claiming damage

by reason of them and plaintiff is resisting his claim, is some indication that the damages which are claimed by the defendant are and were not useful. On the contrary, they were detrimental to all parties involved. The substantial portion of the damages set forth in the counterclaim of the plaintiff are of the nature other than services and are not included, nor were they intended to be included in the subsection cited above. Were it possible for defendant to prove any of the foregoing items of damage, the trial erred in precluding him as a matter of law from doing so.

POINT 11.

THE COURT ERRED IN FINDING THAT PLAINTIFF FURNISHED GRAVEL TO THE DEFENDANT IN ACCORDANCE WITH THE REQUIREMENTS OF THE SUBCONTRACT AND THAT PLAINTIFF SUBSTANTIALLY PERFORMED ALL OF THE COVENANTS AGREED BY HIM TO BE PERFORMED.

Under the terms of Section 3 of the Subcontract, plaintiff was required to perform his obligation of producing gravel in such manner that the delivery of materials would keep up as directed behind grading equipment at all times.

Mr. Hilton, Resident Engineer for the State of Utah, explained the procedure of road construction under the general contract and indicated that there are "some thirty-six items" included in the contract (T. 76). It is first necessary to prepare

the ground by clearing it to prepare for building the subroad. At this stage of construction, other items of construction can be done; such as, "placing of pipe" and the "placing of fence" (T. 76). At this point the subgrade is constructed. When the subgrade is completed, the gravel can be applied. Mr. Hilton indicated that the nature of the soil in the area was sandy and very difficult to keep in place and required an extreme amount of water. Mr. Wood was instructed by Mr. Hilton that "as soon as the subgrade was ready . . . the gravel (was to be) placed on . . . so we wouldn't have to continue to water the subgrade in order to keep traffic and the wind from blowing it. Actually, a lot of it was blow sand and in some cases no amount of water would continue to maintain that road . . . and I wanted him to place this gravel right behind the subgrade preparation" (T. 77). Without the gravel on the subroad, the traffic would mire in the sand.

In addition to maintaining the subgrade structure, gravel was required upon the subgrade immediately to "stabilize the subbase" (T. 77).

Mr. Hilton indicated that the gravel was to keep within one thousand feet of the subgrade operation, which included the rough grading, so there would not be interference between the two operations (T. 78-79). He further indicated that for the week ending March 2, 1957, approximately twenty

per cent of the subgrade or the rough grading had been completed; and as of that date, no gravel had been prepared (T. 82). Thus, approximately 2.4 miles of subgrade had been prepared, all of which was ready for gravel. On June 29, 1957, the rough grading was one hundred per cent completed; whereas, the gravel was only 68 per cent complete, or approximately 4 miles behind (T. 86).

Approximately three weeks after Mr. Bethers finally arrived on the job, which would be approximately March 25, 1957, Mr. Hilton, in company with Mr. Wood (defendant), went to Mr. Bethers for the purpose of obtaining a schedule to obtain the needed gravel to catch up with the grading. That conversation in part was as follows:

“Q. Did Mr. Wood give any instruction to Mr. Bethers . . . with reference to keeping the gravel up to the grading equipment?

“A. Yes, he did.

“Q. What was that instruction?

“A. Well, Mr. Wood informed Mr. Bethers that he had been after him to have him keep this gravel on there and that he wanted some information covering when he could expect this gravel and he told him since I was putting pressure to apply on him that he wanted some information from Mr. Bethers as to when this gravel would be available. (T. 89-90).

“Q. Now did you have any other con-

versations with Mr. Bethers, with Mr. Wood present, relative to the condition of the amount of gravel that had been, or was being delivered?

“A. Yes. On at least two other occasions. Once, of maybe two weeks later than this, we also went to him again and practically the same thing was discussed . . .” (T. 90)

Mr. Hilton also testified to other conversations between plaintiff and defendant, where the critical need for gravel was discussed, and Mr. Wood made demands for material (T. 91). He indicated that Mr. Wood was delayed because of the lack of gravel (T. 94). Speaking of the period after the gravel crusher arrived on the job until the end of June, 1957, Mr. Hilton stated:

“A. Well, there obviously were equipment as well as men waiting for gravel. As I stated, I have a crew there of which I am responsible to see that they do their job in respect to the contractor and in this case I had to have an inspector available, a weigh man and a gravel spreader, and I have had them go out to the crusher site and sit there and wait as high as two days waiting for gravel to be crushed that was never crushed.

“Q. Did you observe the same condition with respect to the equipment and men of Mr. Wood?

A. Yes.” (T. 95).

Subsequent to signing the subcontract, plain-

tiff and defendant engaged in a conversation which took place on the same day the contract was signed. The parties went over the proposed schedule of operation and it was estimated that the gravel was to be supplied and completed in June or July. The plaintiff indicated that that would give him plenty of time in which to complete his contract. The plaintiff then estimated that his hourly production would run from 350 to 400 tons of Type 2 and from 250 to 350 of the inch minus material (T. 135). Mr. Wood then instructed Mr. Bethers as follows:

“I then told Mr. Bethers — I said, ‘Mr. Bethers, we don’t want a misunderstanding here. It looks to me like our problem at this point is how we can keep this grading ahead of our production, what you anticipate this plant will put out.’ I showed him the plans. Then we said, ‘We’ve got this section here that has got ten thousand yards that has to be within one thousand feet or a half a point and then we go down to another point.’ We pointed this out to him that there is one place here where we’ve a half a million yards — excuse me, better than one hundred thousand yards that goes in to one fill. Now how are we going to keep you satisfied when we get to this point. Your crushing plant is going to be down. We can’t prepare the grade fast enough. He said, ‘That is all right. We can work on the plant off and on all the time. There is always work that you can do on a plant, so we won’t worry about that.’ But he gave us the assurance of every way that I

know how to get it that gravel would be there when the grade was prepared.”

At this time Mr. Bethers indicated on the day the contract was signed, which was January 17, 1957, that he would have the crushing equipment on the site within a week.

Testimony indicated that the crusher did not in fact arrive on the site until March 4, approximately a month and a half later, during which period of time Mr. Wood had made several requests and inquiries of Mr. Bethers that it would be on the job within a day or two. The day following the arrival of the crusher, Mr. Wood, in the presence of another, had a conversation with Mr. Bethers, in which he indicated his concern about being behind schedule and asked Mr. Bethers what he was going to do to catch up, and gave him instructions as to the manner in which it was to be produced (T. 39). In accordance with the contract, Mr. Wood instructed him that the gravel was to be stored in the bin and was assured that the same would be installed “in a couple of days.” (T. 139) Mr. Wood again explained the problem relative to keeping up with the machinery and indicated the difficulty that was being experienced in getting traffic through because of the absence of gravel on the grade. Again Mr. Wood directed him by telling him to catch up with his contract, indicating that the gravel was to be

produced in sufficient quantity to keep up with the grading (T. 139-140). Again, on about March 15, 1957, Mr. Wood approached Mr. Bethers and gave him the following instruction.

“A. I told him that we were building grade faster than he was producing gravel and that I wanted him to do something about it. I wanted him to run the crusher more or suggested that he run a double shift; that he do something about catching up with his contract. I didn't have a solution myself. I couldn't tell him what to do.” (T. 140).

Mr. Wood had another conversation with Mr. Bethers relative to the condition of the contract during the latter part of May. Mr. Wood indicated to Mr. Bethers that the job “absolutely was clear out of reason as far as keeping up with the contract was concerned, and that something absolutely had to be done” (T. 144). Mr. Wood doubted the ability of Mr. Bethers to catch up with the contract and suggested that additional equipment be obtained. Mr. Bethers then indicated that he had made arrangements for another crusher for the purpose of helping him finish the contract (T. 144). The crusher was not obtained by Mr. Bethers, and defendant Wood made contact with a Mr. Allen who owned the crusher and sent his own transport for the purpose of moving the crusher onto the site, and with the assistance of Mr. Wood's men the crusher

was placed in operating condition and operated for approximately four days (T. 146).

From the time the subcontract was entered into between the parties there was delay on the part of the plaintiff. First of all, he indicated his willingness to have the crusher on the job within a week. It did not arrive for approximately six weeks, at which time approximately $2\frac{1}{2}$ miles of the subgrade was completed. Even after the crusher arrived, after insistence on the part of Mr. Wood and visits from Mr. Hilton, the Resident Engineer, the plaintiff failed to produce gravel in sufficient quantities to keep up to his contract. As a matter of fact, he fell so far behind in the production of his gravel that by the end of June, when the entire subgrade had been completed, he was over four miles behind. As was noted above, Mr. Wood went to him on numerous occasions in an attempt to resolve the problem, and suggested that a double shift be run, which the plaintiff declined to do. He then suggested that additional equipment be obtained, which Mr. Bethers accepted and then did not follow through. Mr. Wood, in an effort to bring the gravel production up to the grading, sent his own equipment for a gravel crusher and placed it in operating condition. The record is replete with evidence to the effect that the gravel production was not only delayed, but the conduct of Mr. Bethers was capricious and unreasonable to an extent as to harass

the defendant in the performance of his contract.

It is to be noted further that the representation of gravel production on the part of Mr. Bethers was that he could produce between 250 and 400 tons per hour, depending upon the type of gravel that was being run. The production records which were kept by the Resident Engineer reflect that this schedule of production was seldom if ever maintained (See Exhibit 14, various Reports indicating daily production of gravel), and was far less than the admitted capacity of the crusher.

Had the gravel been produced as Mr. Bethers indicated that it would be, the difficulty would have been in keeping the rough grading ahead of the gravel production, and not in keeping gravel production up to the grading.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Findings of Fact are not supported by the evidence; that the decision of the trial should be reversed and this case remanded for a new trial to allow defendant to prove his asserted counterclaim.

Respectfully submitted,

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