

1960

Harris Bethers v. Lalif Wood dba Industrial Construction Co. : Brief of Plaintiff and Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Bethers v. Wood*, No. 9062 (Utah Supreme Court, 1960).
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In the
Supreme Court of the State of Utah

HARRIS BETHERS,
Plaintiff and Respondent,

vs.

LALIF WOOD, d/b/a INDUSTRIAL
CONSTRUCTION COMPANY,
Defendant and Appellant.

Case No.
9062

FILED

MAR 3 - 1960

Clerk, Supreme Court, Utah

**BRIEF OF PLAINTIFF
AND RESPONDENT**

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
STATEMENT OF POINTS RELIED ON	6
ARGUMENT	7
POINT I. THE COURT DID NOT ERR IN DIS- MISSING THE COUNTERCLAIM	6, 7
A. Sections 3 and 5 (k) of the subcontract bar the defendant's claim for damages	6, 7
B. The defendant's counterclaim is barred by reason of his failure to comply with the re- quirements of Section 5 (l) of the subcon- tract	6, 13
C. Defendant's failure to make progress pay- ments excused any delay in performance of the subcontract	6, 16
D. The defendant has waived any right he might have had to recover damages for delay ..	6, 18
POINT II. THE COURT DID NOT ERR IN AWARDING JUDGMENT ON THE COM- PLAINT	7, 19
CONCLUSION	20

CASES CITED

Ancrum v. Camden Water, Light & Ice Company, 82 S. C. 284, 64 S. E. 151	11
Bottemiller v. Ball, 130 Ore. 255, 279 Pac. 542	10

TABLE OF CONTENTS—Continued

	Page
Buffalo Pitts Company v. Alderdice, (Texas), 177 S. W. 1044	11
Edwards v. Perdue, 177 Ark. 241, 6 S. W. 2d 20	9
Guerini Stone Company v. Carlin Construction Com- pany, 248 U. S. 334, 345	17
Levitt v. Faber, et al., 64 P. 2d 498	16
McCready v. Lindenborn, 172 N. Y. 400, 65 N. E. 208 .	11
People v. McCord, 59 P. 2d 587	16
Rubin v. Crowley, Milner & Company, 214 Mich. 365, 183 N. W. 51	9
Sherer v. City of Laguna Beach, (Cal., 1936), 57 P. 2d 157	18

TEXTS

12 Am. Jur. 1042	8
15 Am. Jur. 448	8
17 C. J. S. 981	17
79 C. J. S. 1143	15

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Defendant and Appellant.

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**BRIEF OF PLAINTIFF
AND RESPONDENT**

STATEMENT OF THE CASE

The plaintiff, Harris Bethers, commenced this suit in the District Court to recover the agreed price of gravel furnished pursuant to a written contract. The defendant counterclaimed seeking alleged damages for a purported delay in the furnishing of the gravel. There is no dispute as to the amount of gravel furnished by the plaintiff. For practical purposes the merit of the counterclaim is the only

genuine issue in the lawsuit. The trial court sitting without a jury took evidence on the complaint and counterclaim. On plaintiff's motion, judgment was entered on the complaint for the gravel furnished by plaintiff, and the counterclaim was dismissed. This appeal followed. The parties will be referred to as they were in the Court below. "R" indicates page numbers of the record on appeal.

STATEMENT OF FACTS

On January 16, 1957, the defendant, as prime contractor, entered into a contract with the State of Utah for the construction of approximately twelve miles of State road in Kane County. Defendant then entered into a subcontract with the plaintiff whereby the defendant agreed to pay specified prices per ton for three types of gravel to be furnished by the plaintiff. The defendant entered upon performance of the contract during the early part of February and thereafter completed the job to the satisfaction of and within the time allowed by the State of Utah under the prime contract. By August 10, 1957, the plaintiff had furnished all of the gravel which he had agreed to furnish under the terms of the subcontract with the exception of certain gravel in stockpile.

The prime contract was completed December 11, 1957, with the reservation that a certain quantity of gravel would later be stockpiled (R. 113). On December 4, 1957, plaintiff and defendant modified the subcontract to provide terms for the furnishing by the defendant of certain gravel in stockpile (Exhibit 7). Except as amended, the original subcontract remained in full force and effect. There was

nothing in the amendment of December 4 to indicate that defendant was then claiming damages against plaintiff. There was a delay in the completion of the stockpiling under the amended subcontract and on December 21 (Exhibit 8) defendant terminated the subcontract and took over under Section 3 thereof which provided that "should contractor have to assume charge on account of delay by subcontractor, the expense accrued therein will be deducted from the contract price" (Exhibit 1). The "expense accrued" (being the additional cost of obtaining gravel for stockpiling from other sources) was charged against the contract price. The trial court took this into account in determining the amount due for gravel furnished by the plaintiff (See Exhibit 3).

Defendant's counterclaim is predicated upon a theory that he is entitled to damages for delay incurred prior to the amendment of the contract. The plaintiff denies that there was any delay chargeable to him and alleges that the purported counterclaim is barred by the provisions of the subcontract and by defendant's failure to comply with it.

The defendant commenced the first work on the job during the early part of February, 1957. Certain grading was required before gravel could be used. Gravel crushing operations commenced March 4. The defendant was to pick up the gravel at the site of the crushing plant (Exhibit 1). Although there was no provision in the contract as to when plaintiff's operation was to begin, defendant suggests that plaintiff should have been on the job sooner. Under the provisions of the prime contract, all gravel had to be weighed before it was placed in the road (Exhibit 10, Sheet 5), and the subcontract required the defendant to furnish

scales for weighing same. The defendant did not furnish the scales until sometime between February 25 and March 4 and thus if there was a delay it could not have been material. There was no obligation on the part of plaintiff to stockpile the gravel, and until the scales arrived, the operation intended by the parties could not be carried out. Gravel crushing operations began about the time the defendant furnished the scales to weigh the gravel.

In an attempt to prove delay, the defendant introduced a bar graph showing the timetable of operations on the job (Exhibit 11). It was contended by defendant that plaintiff had failed to comply with the time schedule set forth on the bar graph (R. 22). This time schedule was prepared by the defendant. Although it is not admitted that the time schedule set forth in the bar graph was in any way binding on the plaintiff, it is significant to note that the furnishing of gravel was actually ahead of the defendant's estimate as to the length of time it would take to produce the same. The bar graph indicated 140 working days to furnish the coarse gravel and said gravel was furnished in considerably less time (R. 102). The graph indicated 130 days to furnish the type "B" gravel and 99% was furnished within said time (R. 103). The other 1% was represented by stockpile at a site known as the Blue Pool Bridge. The December 4 amendment to the contract covered an uncompleted portion of gravel to be stockpiled under the subcontract and gravel for stockpiling in addition to that specified in the subcontract.

The subcontract required plaintiff to furnish coarse gravel at \$.38 per ton; type "B" gravel at \$.38 per ton, and

type "A" gravel at \$1.75 per ton (Exhibit 1). Defendant was paid by the State of Utah for the same materials at the rate of \$.72 per ton for the coarse; \$.75 per ton for the type "B", and \$2.00 per ton for the type "A" (Exhibit 10). Although defendant was paid by the State for all of the gravel furnished by plaintiff, he refused to pay plaintiff for gravel furnished after June, 1957. The contract provided that progress payments would be made upon the basis of the engineers' reports (Exhibit P-1). Plaintiff produced gravel during all of the summer months with no payment whatever for the materials furnished. In this regard the trial court found:

"The defendant paid a part of the agreed purchase price of said gravel but failed and refused to pay the plaintiff for the gravel furnished for the months of July, August, September and October and for part of the gravel furnished during the month of December, all in the year 1957. The subcontract required the defendant to make progress payments to the plaintiff for gravel furnished during each of said months and the defendant failed and refused to do so" (R. 162, 163).

Defendant claims that he had men and equipment on stand-by during the months of July to October (R. 12-15) and that plaintiff should be charged with the wages of defendant's employees and the rental value of his equipment because of an alleged delay on the part of plaintiff in furnishing the gravel. It is admitted that no notice of such claim was given to the plaintiff until long after it is claimed to have accrued. The December amendment to the subcontract was after virtual completion of the road and provided

additional work for the plaintiff in stockpiling. There was no recital in the amendment of any alleged claim.

The defendant's counterclaim was disclosed for the first time when this suit was brought. The trial court held that the measure of damages and remedy for delay specified in the subcontract was conclusive on the defendant. Since defendant had already been credited with the measure of damages specified therein, there was no further issue on the counterclaim. The trial court further held that defendant's failure to give notice of his alleged claim pursuant to the provisions of the subcontract barred the claim and that the defendant was not entitled to prosecute the same.

STATEMENT OF POINTS RELIED ON

POINT I.

THE COURT DID NOT ERR IN DISMISSING THE COUNTERCLAIM.

- A. Sections 3 and 5 (k) of the subcontract bar the defendant's claim for damages.
- B. The defendant's counterclaim is barred by reason of his failure to comply with the requirements of Section 5 (l) of the subcontract.
- C. Defendant's failure to make progress payments excused any delay in performance of the subcontract.
- D. The defendant has waived any right he might have had to recover damages for delay.

POINT II.

THE COURT DID NOT ERR IN AWARDING
JUDGMENT ON THE COMPLAINT.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN DISMISSING
THE COUNTERCLAIM.

A. Sections 3 and 5 (k) of the subcontract bar
the defendant's claim for damages.

Sections 3 and 5 of the subcontract so far as material
here provide as follows:

"Section 3. The Subcontractor agrees to complete the several portions and the whole of the work herein sublet by the time or times following: (Here insert the date or dates 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. The Contractor and Subcontractor agree to be bound * * * 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."

It is important to note that Section 3 of the subcontract is a specific section dealing with the time for performance and prescribing a remedy and measure of damages for delay. The legal effect of this provision is to make any delay on the part of the subcontractor a material breach of the contract which gives the contractor the remedy of terminating the contract and charging the entire cost of completion against the contract price. This is a reasonable and effective remedy. The issue before the District Court and before this Court on appeal is not what the measure of damages for delay would be in the absence of this provision. The question here is whether or not the remedy or measure of damages prescribed by this section of the contract is exclusive. We submit that the trial court did not err in determining that it is.

It appears to be a majority rule of law that where the parties to a contract prescribe a remedy for breach the remedy so prescribed is exclusive. The general rule is stated in 12 Am. Jur. 1042 as follows:

“* * * [W]hen parties stipulate in a contract what the consequences of a breach of the agreement shall be, such stipulation if reasonable is controlling and excludes other consequences. Where a contract prescribes a remedy for a breach, that remedy is generally exclusive.”

This is also true where a rule or measure of damages is referred to in the contract. The rule is expressed thus in 15 Am. Jur. 448.

“§49. Agreements as to damages.—Where parties agree upon a rule of damages to be followed in case of a breach, no other or different rule will be enforced.”

There is no rule of law which prevents parties to a contract from stipulating for a particular remedy or measure of damages to apply on default and where there is such a stipulation, it has been interpreted by the courts to be exclusive. A case applying this principle of law is *Rubin v. Crowley, Milner & Company*, 214 Mich. 365, 183 N. W. 51. In the *Rubin* case plaintiff brought suit for the purchase price of 18 coats sold to the defendant. The defendant sought to offset the amount of its damages caused by an alleged nonconformity of the coats with samples submitted before the sale. Among the provisions of the contract was the following:

“All goods in excess of purchase or different from samples or specifications, returnable at shipper’s expense.”

The defendant contended that the language of the contract simply gave him the right to return the goods but did not provide an exclusive remedy for breach of contract, and that it could elect to retain the coats and sue for its damages. The court held that the remedy provided by the contract was exclusive. In construing the agreement, the court said:

“[T]he instant case is one where an express contract exists, where the parties have by express agreement provided for the contingency which arose and agreed upon the measure of their liability. Under such circumstances we do not feel called upon to determine what the rights of the parties would be in case there was no contract, * * *.”

In *Edwards v. Perdue*, 177 Ark. 241. 6 S. W. 2d 20, the plaintiff sold a lease to the defendant under a contract pro-

viding for the payment of the purchase price in installments. The lease was put in escrow with instructions to the escrow agent that in the default of the payment of the purchase price the lease was to be returned to the seller after which no obligation should remain. Plaintiff brought suit for recovery of the balance of the purchase price and the defendant contended by way of defense that the return of the lease was the sole remedy. The trial court allowed recovery of the balance of the purchase price and the Supreme Court reversed. The rationale of the court is expressed in the following language:

“It is a settled principle of law that, when the parties themselves in a contract provide the remedy in case of default by either party, the remedy so provided is conclusive.”

Similarly, in *Bottemiller v. Ball*, 130 Ore. 255, 279 Pac. 542, the buyer under a written land purchase contract agreed that the seller should be entitled to a surrender of the land upon default in the performance of the contract by the buyer. The court was called upon to determine whether or not upon the buyer's default the seller had any remedy other than to recover the property. The court said:

“When the parties prepared their contract they evidently anticipated such a situation as now confronts them and made provision as to how the controversy should be disposed of; that is, the defendant should ‘surrender and deliver up the said property and premises to the seller.’ They are agreed that this court has held that when a contract prescribes a remedy for a breach, that remedy is generally exclusive and will be enforced. The following adjudications justify their conclusions. (Citing Cases.)”

In *Buffalo Pitts Company v. Alderdice*, (Texas), 177 S. W. 1044, the rule was expressed as follows:

“* * * It has uniformly been ruled that, when the parties to a contract agree upon the remedies that shall accrue in case of breach thereof, such agreed remedies are exclusive of all others.”

In *McCreedy v. Lindenborn*, 172 N. Y. 400, 65 N. E. 208, the Supreme Court of New York said:

“* * * When the parties by their contract provide for the consequences of a breach, lay down a rule to admeasure the damages, and agree when they are to be paid, the remedy thus provided must be exclusively followed.”

In *Ancrum v. Camden Water, Light & Ice Company*, 82 S. C. 284, 64 S. E. 151, the rule was stated thus:

“When parties themselves stipulate in the contract what shall be the consequences of a breach of the agreement, such stipulation if reasonable, is controlling, and excludes other consequences. (Citing Cases.)”

We submit that even disregarding Section 5 (k) of the contract the legal effect of prescribing a remedy for delay in Section 3 was to render said remedy exclusive. Regardless of the above rule of law, however, it is clear from a reading of the subcontract that it was the intent of the parties that the remedy and measure provided be exclusive.

Assume the rule to be that the court must construe the entire contract to determine whether or not the remedy prescribed for delay was *intended* by the parties to be exclusive. The same result must follow. Section 3 was clearly

intended by the parties to prescribe the time for performance and the penalty or remedy for delay. The parties contemplated that the contractor (defendant) would "assume charge" in the event of delay and deduct "the expense accrued therein" from the contract price. By paragraph 5 (k) the contractor agrees "to make no demand for penalty for delay in any sum in excess of such amount as may be specifically named in the subcontract." *The "penalty for delay" prescribed by Section 3 is the sum expended by the contractor in completing the job after he has assumed charge on account of delay.* (In some cases this could equal or exceed the contract price.) Thus, the very language of the contract itself makes the penalty or remedy for delay prescribed in Section 3 exclusive. A different construction would certainly defeat the obvious intent of the parties. The parties did not intend another or different remedy or measure of damages.

The most conclusive answer in this case, however, is the fact that the contractor did "assume charge on account of delay" and the expense accrued therein was charged against the contract price. He did avail himself of the prescribed remedy. The evidence is clear as stated by appellant in his brief that the defendant did take over performance of the contract as modified and it is agreed that the entire expense accrued therein was charged against the contract price. When defendant took over after terminating on December 21, he indicated in his letter of termination that the measure of damages would be to withhold the cost of completion from amounts due plaintiff (Exhibit 8). This should be the end of the counterclaim.

The defendant, having availed himself of the remedy prescribed in the contract, now seeks to recover under an entirely separate remedy and measure of damages. Defendant says that he had men and equipment on stand-by during the months of July through August; that the wages and rental value thereof (amounting to a figure of approximately \$53,000) is chargeable to the plaintiff; that he could continue to incur a counterclaim against defendant on the theory of delay, and that when this imaginative amount had been incurred, he could then step in, complete the contract, charge the entire cost of completion to the plaintiff, and then recover the full amount of all of his claimed damages for the period he had not pursued the remedy prescribed in the contract. We submit that the court properly interpreted Sections 3 and 5 to limit the defendant's recovery to the amount expended in completing the contract and to preclude the fantastic counterclaim.

The cases cited in defendant's brief in support of the argument that the prescribed remedy is not exclusive do not involve contracts prescribing a remedy for a specific breach nor a provision (such as Section 5 (k)) expressly limiting the contractor's remedy to that prescribed by the parties. The general principles of law urged by defendant have no application whatever to the facts of this case where the court must construe the contract of the parties.

- B. The defendant's counterclaim is barred by reason of his failure to comply with the requirements of Section 5 (l) of the subcontract.

Section 5 (1) of the subcontract reads as follows:

"The Contractor agrees—(1) 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."

Defendant's counterclaim is composed of employee's wages and the alleged rental value of equipment (See R. 22). (Defendant was allowed the item for gravel procured from other sources.) No notice of claim covering these charges was given to the subcontractor (See Supplemental Record). This is not a case involving claims for delay consisting of penalties imposed upon the contractor by the owner or general allegations of loss of profits. The contractor seeks here to charge men and equipment to the subcontractor. The question is whether or not the contractor under the provisions of his contract may allow such expense to accrue without notice to the subcontractor and still have a right to recover the alleged items of expense. We think that Section 5 (1) was drafted to avoid this very result.

The obvious purport of Section 5 (1) was to provide the subcontractor with notice of his standing with, and obligation to the contractor. If the contractor was to charge the subcontractor with the wages of employees or rental value of equipment, the subcontractor was entitled to notice as prescribed by the contract and in the absence thereof no such claim is "valid."

In urging that the trial court erred in interpreting Section 5 (1), the defendant cites a single case which con-

strues the words "stockyard services" as used in a statute. Obviously, the judicial interpretation of the words "stockyard services" could have no application to the facts of this case. Contrary to the defendant's tortuous construction to require something "useful" (whatever that means), the purpose of the provision in which this word "services" is used is to give notice of the charge to the subcontractor. It gives him a right to know of these charges as they accrue so that he may know of his standing with the contractor and do what is necessary to avoid such future charges. If he is to be charged, it is of no concern to him whether the service is characterized as useful or not. His interest is in the purported charge and an itemization thereof and not an analysis of the character of it. It makes no difference whether the men and equipment were actually working in what the contractor characterizes a "useful endeavor" so long as the charge was to be made to the plaintiff. Section 5 (1) gave him a right to know of the claim. If the charges for alleged rental value and wage expense are for "services" within the meaning of Section 5 (1) *as construed in light of the purpose of the provision in which they are found*, the defendant's failure to give notice bars his claim. The issue is just that simple.

The legal definition commonly given for the word "services" is expressed in 79 C. J. S. 1143, as follows:

"Services. * * * In the plural the term involves more than mere labor, and signifies much more than merely the act of performing labor and may include as well expenditures, materials and things furnished."

In the case of *Levitt v. Faber, et al.*, 64 P. 2d 498, the California court distinguished between the terms "services" and "personal services." In so doing, the court said:

" 'Services' and 'personal services' are not definitely co-extensive. * * * 'Services' may be rendered *though the actual labor be performed by one's employees and by means of his machinery or other equipment*, but 'personal services' are those performed by the individual himself." (Emphasis supplied.)

Thus services includes not only manpower but machinery and equipment. See also *People v. McCord*, 59 P. 2d 587, interpreting the language "services or materials" to include a charge for transportation.

Considering the purpose of the text where it is found, the language "claim for services rendered" includes the wages of employees and the rental value of equipment which the defendant seeks by his counterclaim to charge to the plaintiff. The whole purpose of Section 5 (1) is to give notice to the subcontractor of any such claim and an interpretation which would allow the contractor to charge such items to the subcontractor and recover the same without notice frustrates the plain language and intent of the written instrument. The court did not err in holding that the counterclaim was barred for defendant's failure to comply with Section 5 (1).

C. Defendant's failure to make progress payments excused any delay in performance of the subcontract.

The plaintiff is suing for gravel furnished after June 30, 1957. Defendant claims that he had men and equipment on stand-by during that period. During the same period the defendant failed and refused to make progress payments for the gravel furnished by the plaintiff. The failure to make progress payments was a material breach of the subcontract which would not only have justified the plaintiff's termination of the contract had he chosen to do so, but under the circumstances constituted a legal excuse for any delay. In *Guerini Stone Company v. Carlin Construction Company*, 248 U. S. 334, 345, the United States Supreme Court said:

“* * * In a building or construction contract like the one in question, calling for the performance of labor and furnishing of materials * * * a stipulation for payments on account to be made from time to time during the progress of the work must be deemed so material that a substantial failure would justify the contractor in declining to proceed.”

The general rule of law to the same effect is set forth in 17 C. J. S. 981. If such a failure on the part of the contractor would excuse further performance on the part of the subcontractor, certainly it would excuse delay in performance. The contractor should not be heard to complain of delay at the same time he is withholding payments due the subcontractor under the provisions of the contract. The defendant is not entitled to insist upon a strict compliance with the time provisions of the contract when he himself has failed to do his part on time or at all. We submit that the defendant's failure to comply in this respect is a bar to his counterclaim.

D. The defendant has waived any right he might have had to recover damages for delay.

A party entitled to damages may lose his right to recover the same by waiver. *Sherer v. City of Laguna Beach*, (Cal., 1936), 57 P. 2d 157. In this case the defendant claims to have built up a very substantial claim for damages by reason of alleged breach of the subcontract. Not only did the defendant fail to notify the plaintiff of the accrual of said claim, but after all alleged items thereof had been incurred, the subcontract was amended and the subcontractor was directed to go on with his work in furnishing gravel. The defendant was probably apprehensive that had he made a proper claim at that time for the fantastic amounts he now seeks to recover plaintiff would not have been willing to supplement the subcontract and to continue performance thereunder. Whatever the explanation, the supplement contained no reference or reservation of the defendant's purported claim. Even when the defendant terminated the subcontract on December 21, 1957, the only indication of any claim for damages was that defendant would withhold the expense of furnishing the unexecuted portions of the subcontract (Exhibit 8). This was done. We submit that in allowing the defendant to perform under the contract and under the supplement thereto over a period of approximately six months without notice of the purported claim which he contends was accruing and in amending the contract and terminating it without reference to the items set forth in the counterclaim, the defendant has effectively waived the claim for damages and should not be allowed to assert the same.

POINT II.

THE COURT DID NOT ERR IN AWARDING
JUDGMENT ON THE COMPLAINT.

Defendant contends that the plaintiff did not substantially perform the subcontract. The evidence conclusively shows that he did. The subcontract and the amendment thereto called for plaintiff to furnish three different types of gravel the aggregate quantity of which was 182,510 tons (Exhibits P-1 and 4). The plaintiff actually furnished 187,919.85 tons (Exhibit P-2), or approximately 5,400 tons in addition to the tonnage specified in the contract. It is true that the job required gravel in excess of that specified in the contract but the total of all gravel purchased by the defendant from outside sources was only 4,287 tons (Exhibit 3). In accordance with the agreement of the parties, the cost of this gravel was deducted from the contract price due plaintiff. Under the contract (Sections 2, 3 and 4) plaintiff was entitled to the contract price less this deduction. The eventuality that defendant might take over and expend monies in completion was specifically provided for and it is clear that the contract was so drawn as to allow recovery for gravel furnished by the plaintiff regardless of delay.

On the issue of delay the evidence compels a finding that the plaintiff substantially performed under the time requirements of the contract. As already pointed out, the gravel for the roadbed was actually furnished in less time than the defendant himself prescribed in the time schedule (See page 4, *supra*). The defendant actually finished his contract with the State ahead of schedule.

In any event it could hardly be contended with any semblance of reason that the plaintiff is not entitled to be compensated for the gravel furnished to the defendant. The defendant was compensated by the State for every ton of gravel furnished by the plaintiff. Even ignoring the contract which, in the event of delay, directs the payment of the contract price less defendant's cost of acquiring other gravel, quantum meruit would bring more than the contract price judging from the price which defendant paid for the additional gravel (Exhibits 3 and 7) and the price he obtained from the State (Exhibit P-1). The value to him of the gravel furnished by the plaintiff far exceeded the cost which plaintiff was allowed to recover. We submit that the judgment on the complaint should be affirmed.

CONCLUSION

We submit that a reasonable and fair construction of the subcontract precludes the defendant from recovery of the alleged items of damage specified in the counterclaim. The defendant's own flagrant refusal to meet the time requirements regarding progress payments and to give notice of the purported claim as it accrued is also a complete defense to the counterclaim. The court did not err in allowing the plaintiff the agreed cost of the gravel furnished less the added cost to defendant of procuring additional gravel. We submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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