

1968

Weyher Construction Company v. Cox Construction Company, Inc., and United States Fidelity and Guaranty Company : Appellants' Brief

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IN THE SUPREME COURT
of the
STATE OF UTAH

WEYHER CONSTRUCTION
COMPANY,

Plaintiff and Respondent,

vs.

COX CONSTRUCTION COMPANY,
INC., and UNITED STATES
FIDELITY AND GUARANTY
COMPANY,

Defendants and Appellants

Case No.
11353

APPELLANTS' BRIEF

Appeal From Judgment For Plaintiff of the
First Judicial District Court in and for Box Elder County
Honorable Lewis Jones, Judge

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APPELLANTS' BRIEF

NATURE OF THE CASE

This action involves certain claims by plaintiff against both defendants and counterclaims by defendant Cox Construction Company, Inc., (hereinafter called "Cox"), against plaintiff, all arising out of a subcontract agreement entered into between plaintiff and Cox for the performance of certain work by plaintiff on an interstate highway project in Box Elder County, Utah. Plaintiff was a subcontractor; Cox was the prime contractor; and defendant United States Fidelity & Guaranty Company was surety for Cox.

DISPOSITION IN LOWER COURT

The case was tried on special interrogatories to a jury commencing April 30, 1968, and concluding May 6, 1968. The answers of the jury to the special interrogatories were generally in favor of plaintiff and against defendants on the Complaint and against defendant Cox on its Counterclaim. The court made Findings of Fact and Conclusions of Law and entered judgment in favor of plaintiff and against defendants. Defendants' motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial were denied.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the judgment entered by the district court and a remand of the case to the district court with instructions to proceed as follows:

1. To find that plaintiff was liable to Cox for any damages suffered by Cox resulting from delay caused by plaintiff and delay in the delivery and installation of structural steel.

2. To enter judgment in favor of defendants and against plaintiff on plaintiff's claim for costs incurred because of the delay in the delivery and installation of structural steel.

3. To hold a further hearing to determine the amount of damage suffered by Cox under its Counterclaim by reason of the delay caused by plaintiff and the delay in the delivery and installation of structural steel.

In the alternative, appellants seek a reversal of the judgment entered by the district court and a remand of the case for a new trial.

STATEMENT OF FACTS

The record in the case is lengthy and the facts are rather complicated. However, disposition of the case basically turns on the question who, as between plaintiff and Cox, was responsible to the other for the delay which occurred in the delivery and installation of the structural steel on the project. At the conclusion of the work Cox withheld from the final payment to plaintiff the sum of \$26,972.14, claiming damages in excess of that amount. The judgment awarded plaintiff (1) the balance withheld under the subcontract; (2) damages for delay in completion of plaintiff's work; and (3) attorney's fees. Appellants will attempt to focus on the negotiations, agreements and other facts involving the relationship and dealings among plaintiff, Cox and the supplier of structural steel. In this connection appellants do not contest the award to plaintiff of its costs incurred in dewatering excavations and in flagging traffic.

In the latter part of 1965, the Utah State Department of Highways called for bids for the construction of a bituminous surfaced roadway and four cantilevered steel girder structures in Box Elder County, Utah. There were two projects involved, one for construction of a part of Interstate 15 west of Brigham City from 14th South Street, Brigham City, north to U.S. Highway 30-S, and the other covering construction of the access road to the freeway along 14th South Street from U.S. Highway 89 to Interstate 15. The Interstate 15 work was designated as project No. I-IG-15-8(26)357, and the 14th South Street construction was called project No. F-FG-001-8(4).

Cox was one of the contractors submitting bids to the State of Utah on the project. In the process of preparation of its bid, Cox contacted a number of subcontractors to determine the prices at which it could subcontract different portions of the work. The construction of the structures was a major item in the contract and included both structural concrete and structural steel work, and Cox discussed possible prices on the structural concrete portion of the project with plaintiff and several other subcontractors. (R. 314, 315). In addition, it discussed the structural steel part of the project, which was designated a specialty contract, with Western Steel Company and at least one other steel supplier. (R. 316).

The bids were opened by the State about December 21, 1965, and Cox was the low bidder. About two weeks thereafter, it was awarded the prime contract. On about December 23, 1965, between the time of the bid opening and the award of the prime contract, Cox received a Proposal and Agreement from Western Steel under which Western Steel proposed to deliver and erect the structural steel in place on the project for a total price of about \$240,000. (Ex. P 36, R. 222). Cox did not sign the Agreement at the time it was received because Cox had not yet been awarded the prime contract by the State and had not yet obtained a subcontractor for the structural concrete work, which immediately preceded and followed the steel erection. (R. 317, 318).

On January 10, 1966, following the award of the contract by the State, plaintiff's president, Robert Weyher met with Cecil J. Cox, the president of Cox, at Manti, Utah, at Cox's office. Cox had not yet signed the Proposal and Agreement with Western Steel at the time of this meeting with plaintiff. (R. 318). During the course of the meeting between plaintiff's president and the president of Cox, they discussed the delivery and erection of the structural steel and the proposal from Western Steel. This proposal incorporated in its terms a final completion date for the steel erection of June 30, 1966. (Ex. P 36). The subcontract agreement between plaintiff and Cox, which had been prepared by Cox, required a completion date on the concrete work of June 30, 1966. Before signing the subcontract with Cox, plain-

tiff's president placed a call from Manti to Western Steel to determine whether Western Steel could meet a delivery date of about June 15, 1966, so that plaintiff could complete the required part of the concrete work by June 30, 1966. (R. 82, 83, 84 Ex. 46). Immediately following plaintiff's telephone conversation with Western Steel, plaintiff and Cox signed the Subcontract Agreement. (Ex. 2). The subcontract was prepared on a printed form with certain of the provisions typed in and two handwritten and initialed changes. The following paragraph was typed (R. 320) on page 11:

"Subcontractor of structural concrete will be responsible for ordering the steel and making sure that the steel items will be taken care of in plenty of time so as not to delay his contract.

This will be made part of the subcontractor's contract."

After the Subcontract Agreement with plaintiff had been signed, Cox then executed the Proposal and Agreement from Western Steel Company, dated it January 10, 1966, the date it was signed, and placed it in the mail. (R. 321, Ex. 36). The Proposal and Agreement was received by Western Steel January 12, 1966. (Ex. 46).

Cox received a notice from the State to proceed with the projects on January 12, 1966, which required it to commence work on or before January 22, 1966. (R. 47). The subcontract between plaintiff and Cox provided that plaintiff commence work not later than January 15, 1966, but plaintiff could not do so because work did not commence on the project until January 21, 1966, and it was necessary for Cox to complete certain excavation and pile driving before plaintiff could start its work. On January 21, 1966, Cox started the excavation required for the structural concrete.

In the construction of the structures and the roadbed and surface abutting the structures the following material seteps had to be completed in the indicated order and, so far as relevant here, by the indicated persons:

1. Excavate, drive piles into floor of excevation, fine grade and cut off piles. (Cox).
2. Form and pour concrete pile cap. (Weyher).
3. Form and pour concrete columns. (Weyher).
4. Form and pour concrete column caps. (Weyher).
5. Install structural steel beams. (Western Steel).

6. Form and pour concrete abutment. (Weyher).

7. Form and pour concrete deck. (Weyher).

8. Form and pour concrete approach slab. (Weyher).

9. Place gravel in roadbed abutting structure to specified elevation. (Cox).

10. Place prime coat of oil on gravel. (Cox).

11. Place bituminous base course. (Cox).

12. Place bituminous surface course. (Cox).

(R. 25, 26, 28, 67, 68, 69, 70, 71, 72, 382, 383, 384, Ex. P 2). Each of these steps had to be completed on each of the four structures, but work could be done on more than one structure at a time. The excavation and pile driving had progressed far enough for plaintiff to start its work on the first structure by February 13, 1966. (R. 59). Plaintiff started February 14, 1966, and proceeded from structure to structure with all of the concrete work which could be performed before the installation of the structural steel beams (Step 5), between February 14, 1966 and March 22, 1966. (R. 172). Plaintiff started its work nearly a month later than provided in the subcontract, but it was still able to complete on time all of the work it had planned to do prior to the erection of the structural steel, which plaintiff expected to start about April 1, 1966. (R. 164, Ex. 23).

At the time of the telephone conversation between plaintiff's president and Western Steel Company on January 10, 1966, Western Steel had advised plaintiff that it would begin the erection of the structural steel no later than April 15, 1966 and would try to start by April 1, 1966. (R. 86, Ex. 23). However, because of delays in the shipping and fabrication of the steel, Western Steel made its first delivery of structural steel to the job site on May 24, 1966, and the first erection started on May 28, 1966. (Ex. 28, Ex. 39). A strike by ironworkers started June 1, 1966, and lasted until June 20, 1966, and during this time there was no structural steel erected, although it appears that structural steel was delivered to the job while the strike was in progress. (Ex. 40). Following the strike, erection of the structural steel continued and the steel erection work on all of the structures was completed by August 29, 1966. (Ex. 28). Some 67 days thereafter, on about November 5, 1966, plaintiff completed its subcontract work. (R. 510).

Cox' advance planning of this and other jobs was based upon the assumption that the structures would be completed before it started surfacing the roadway. In the areas of the roadbed adjacent to the structures, it was necessary to have the structures completed, through and including the pouring of the approach slabs, before Cox could build the roadbed surface up against the structures. If the structures had been completed by June 30, 1966, Cox could have run continuously through the

job with its oiling equipment without interruption. (R. 355). However, because of the delay in completion of the structures it was necessary for Cox to adopt a slower method which involved building and oiling the roadbed to a point within one to two hundred feet of each structure and then going around each structure and starting to oil again one to two hundred feet on the other side. Subsequently, after the structures were complete, Cox had to come back and build the roadbed and surface into the structures. The Counterclaim of Cox' basically involved the extra costs and delay incurred by reason of its increased costs for men and equipment due to the delays in completing its work.

From the time of the first contact between plaintiff and Western Steel regarding the construction of the structures, Western Steel coordinated its work directly with plaintiff. (R. 226, 324). In fact, plaintiff's president called Western Steel and advised it that plaintiff had a subcontract with Cox, and plaintiff wanted to know if it would be all right with Western Steel if plaintiff called Western Steel directly on matters of delivery of the structural steel. (R. 234, Ex. 46). From time to time plaintiff contacted Western Steel with reference to availability and delivery of the structural steel. (R. 240).

On March 2, 1966, Western Steel wrote a letter to Cox with a copy to plaintiff setting forth a schedule of delivery of structural steel on the project different from

that given to plaintiff's by President Western Steel in the telephone conversation of January 10, 1966. (Ex. 22). In the letter Western Steel advised Cox and plaintiff that it expected to start shipment of the fabricated steel to the job site on May 1, 1966 and finish fabrication by the end of June. (Ex. 22). Cox did not respond to the change in the schedule announced by Western Steel in its letter of March 2, 1966. (R. 241, 242). On March 4, 1966, after talking with Western Steel about the new delivery schedule, plaintiff wrote Cox advising that because of the delay indicated in the Western Steel letter, plaintiff's performance of its subcontract would be delayed. (Ex. 23). Cox had not been in contact with Western Steel after January 10, 1966, and did not respond to either the letter from Western Steel or plaintiff. There were no changes or modifications to the Cox-Western Steel Agreement according to the Vice President of Western Steel. (R. 233, 241, 242). Cox had no further contact with Western Steel until August 9, 1966, at which time Cox complained by letter because of the delay in the delivery and erection of the structural steel and declared Western Steel to be in default under its contract. (R. 231, Ex. 38).

Following completion of the subcontract by plaintiff and the prime contract by Cox in November, 1966, Cox withheld the sum of \$26,972.14 from the final payments to plaintiff, claiming damages for expenses incurred by reason of the delay in the completion of the

structural steel work and plaintiff's subcontract. Plaintiff brought suit claiming the right to payment of the full contract price and damages for expenses plaintiff incurred by reason of the delay in the erection of the structural steel. The subcontract between plaintiff and Cox provided in Article IX that Cox would not be liable for any delays caused by other subcontractors or material suppliers. Article XIV provided that any claim for damages by plaintiff was waived unless written notice of the claim was given to Cox within five days after the claim arose. Article XV provided that plaintiff accepted the contract price as payment in full for all of the work to be performed and all damages or expenses incurred by plaintiff. Article XVI provided that plaintiff would not be entitled to payment for any delays not paid for by the State. (Ex. 2). Plaintiff did not give Cox notice of its claim for damages due to the structural steel delay until the Complaint was filed in December, 1966. (R. 216).

At the conclusion of trial, over counsel's exceptions, the Court refused to give most of the instructions requested by defendants and plaintiff and gave the jury a total of eight instructions basically stating the following:

1. The interrogatories to be answered by the jury.

2. A statement that there were three possible answers to the first question in the interrogatories.

3. A statement relating to burden of proof.

4. A statement as to credibility of witnesses.

5. A statement outlining the right of the jury to seek further instructions from the Court.

6. A statement of the claims of the parties taken from the pleadings.

7. A statement that the instructions should be read and understood together.

8. An instruction to select a foreman and a statement of the requirement that six members of the jury must concur to answer each question.

The following interrogatories were submitted to the jury, and the Court received the indicated answers.

“1(a). Here set out your finding as to why the delays occurred in connection with the delivery of structural steel onto this job and as to who, if anyone, or what, was responsible for said delays.

Answer: Delay due to steel strike and difficult
fabr. Approx. 30 days in fabr.

1(b). If your answer to the preceding ques-
tion, in effect, places the blame on one of the
parties to this action, then identify here the name
of such party.

Answer: Cox had primary responsibility.

1(c). If you answered the preceding question,
then please here give consideration to any damage
caused to the opposite party by reason of the
failure of the guilty party to seasonably perform,
should you so have determined.

Answer: \$1,226.85 damage against Cox.

- (1) Pl. Ex. 31 Redelivery of forming ma-
terial — disallowed.
- (2) Pl. Ex. 34 Purchase of due form mat-
— disallowed.
- (3) Pl. Ex. 32 Structural stl. delivery del-
— revised*

	<i>Was</i>	<i>Is</i>
*Labor	\$1,621.10	\$ 810.57
Pickup	450.00	225.00
Yard Rental	270.00	190.00
Telephone	16.95	11.57
Total	\$2,358.05	\$1,226.85

2(a). Did defendant Cox hold up plaintiff's operation by failing to seasonably excavate and pile drive? Yes or No.

Answer: No. It did not delay completion of job through column caps.

2(b). If your answer to 2(a) was yes, then here set out how much damage, if any you find, plaintiff has sustained by reason of such delay.

Answer:

3(a). Did defendant Cox fail to de-water the pile cap excavation, thus requiring the plaintiff to do so in order that it might proceed with its own work? Yes or No.

Answer: Yes.

3(b). If your answer to 3(a) was yes, then here set out how much damage, if any you find, plaintiff sustained in this respect.

Answer: \$768.15 in accordance with Pl. 30 less ovhd. & profit.

5(a). Weyher has claimed damage for rental of knee-braces. Is Weyher entitled to recover against Cox for such rental? Yes or No.

Answer: No.

5(b). If your answer was yes to 5(a), here fix such damage, if any.

Answer:

7(a). Did Cox require Weyher to perform flagging for the project? Yes or No.

Answer: Cox did not require Weyher to perform flagging, but Weyher was required to provide flagging because Cox would not as required by State Engineer.

7(b). If your answer to 7(a) was yes, then here set out Weyher's damage, if any.

Answer: \$229.51."

The jury made the following recommendations on page 3 of the verdict:

"1. From the above questions we feel the claims that should be paid Weyher amount to \$2,224.51.**

2. All moneys held back under the contract between Weyher and Cox Construction Company's should by (sic) paid.

3. Based on the evidence presented, we feel that Cox Construction Company claims are not justified.

**\$1,226.85

768.15

229.51

\$2,224.51 Total"

Following denial of defendants' motion for judgment notwithstanding the verdict, the Court entered its Findings of Fact and Conclusions of Law and Judgment against defendants and in favor of plaintiff for the sum of \$2,224.51 on plaintiff's claim for damages and for the sum of \$26,972.14, representing the balance of the contract price, together with interest and attorney's fees. Included in the Findings of Fact were the following:

"2. That Cox entered into a contract with Western Steel Company on January 10, 1966, *after having ordered certain structural steel from Western Steel prior thereto*, which contract was for the fabrication, delivery and erection of structural steel by June 30, 1968; that it was necessary for said steel to be fabricated, delivered and installed on the job before Weyher could complete its subcontract work, and Cox knew or should have reasonably known this fact; that on January 10, 1966, Weyher entered into a subcontract agreement with Cox in reliance upon Cox making the structural steel available so that Weyher could complete by June 30, 1966; Cox knew that Weyher was relying upon the fabrication, delivery and erection of the steel being completed in time; that thereafter on or about March 2, 1966, *Western Steel Company and Cox, without Weyher's consent, modified the said steel agreement by extending the time of fabrication, delivery and erection of steel until some later date subsequent to June 30, 1966, and did further modify the schedule of fabrication, delivery and installation of the steel*, so that it became impossible for Weyher to complete its work by June 30, 1966; that Western experienced difficulty in fabricating the steel,

because of the newness of the type of work, and thus was delayed in its delivery and in the erection of said steel; that Cox was informed of the modified delivery of fabrication scheduled by Western Steel and made no objection thereto, *thus agreeing and permitting the steel to be delivered and erected subsequent to June 30, 1966,* and in fact, on into August, 1966; and that the *said contracting for, ordering and scheduling was performed by Cox* and was of beyond the control of Weyher.

“3. *That Cox having ordered the steel and having agreed with Western Steel to the delayed schedule, made it impossible for Weyher to order the steel to make sure the steel would be taken care of in time and schedule it in accordance with the terms of the subcontract agreement so that Weyher could perform its work properly; that Cox interfered with Weyher's work and thus prevented Weyher from performing under the terms of the subcontract by June 30, 1966; that Weyher was ready at all times to proceed, and it expeditiously proceed under the contract provisions as soon as the steel was erected; that Weyher attempted repeatedly to perform under the said contract, including the following provisions thereof prior to, during and after the steel erection, and would have done so, but for Cox's interference aforesaid; that Cox had ordered the steel and by so ordering it and agreeing to the new scheduling interfered with and made it impossible for Weyher to comply with the following provisions of said contract:*

'Subcontractor of structural concrete will be responsible for ordering steel and making sure that the steel items would be taken care of in plenty of time so as not to delay his contract. This will be made a part of the subcontractor's contract.'

"4. That by reason of Cox's interference with the Weyher subcontract and performance thereunder, Weyher was delayed and damaged in the performance of the subcontract work, which delay was for more than 30 days and which damages were additional and unanticipated reasonable costs incurred as a result thereof, in the amount of \$1,226.85; . . . *that Cox knew of and was properly informed of these extra costs and delays and received notice thereof in accordance with the terms of the subcontract agreement.*" (R. 624-626). (Emphasis added).

Included among the Conclusions of Law were the following:

"1. *That Cox Construction Company after entering into the Weyher Construction Company subcontract, interfered with and prevented Weyher from performing said contract, by agreeing to an extension of performance under the Western Steel Company contract, knowing that said extension of time would interfere with Weyher's performance; that said extension of Western Steel's performance was beyond the control of Weyher and was without Weyher's consent; that said action was a breach of the Weyher subcontract and imposed a different and unanticipated condition*

upon Weyher's performance, all of which was beyond the terms of the Weyher-Cox subcontract agreement.

"2. That Paragraph IX of the subcontract provides as follows:

'The contractor will not be responsible for any delays or interference resulting from the act or operations of other Subcontractors or material suppliers.'

That said subcontract provision is inapplicable as a defense to Cox in that after Weyher had executed the subcontract and commenced work thereunder *Cox knowingly amended the Western Steel agreement* without Weyher's consent, thereby changing conditions under which Weyher had previously agreed to said subcontract provisions, and thereby wrongfully, and in breach of his subcontract interfered with performance thereunder; and that the said action of Cox was not such a delay or interference as is excusable thereunder.

"3. That in breach of the said subcontract agreement . . . because of the interference and delay arising out of the fabrication of the steel and failure to complete Western Steel contract on time, Weyher incurred reasonable costs of \$1,226.85; and that Weyher is entitled to payment of and judgment for same against Cox Construction Company.

“4. That Weyher completed the work and performed all other provisions of the subcontract agreement including those which are conditions precedent to bringing an action thereunder; and that the delay was Cox’s responsibility.

“5. The facts found by the jury are proper under the evidence and the law, and Cox breached the subcontract and the particulars therein set forth for which Weyher is entitled to damages as determined by the jury and the special verdict.” (R. 627, 628). (Emphasis added).

Defendants’ motion for a new trial was denied and defendants brought this appeal.

ARGUMENT

POINT I

THE JUDGMENT ENTERED BY THE COURT IS NOT SUPPORTED BY THE EVIDENCE AND IS BASED UPON FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH ARE CONTRARY TO THE EVIDENCE.

It is uncontested that on January 10, 1966, plaintiff and Cox entered into a subcontract agreement which, in part, provided:

“Subcontractor of structural concrete will be responsible for ordering the steel and making sure that the steel items will be taken care of in plenty of time so as not to delay his contract. This will be made part of the Subcontractors (sic) contract.”

It is also uncontested that the structural steel was not delivered and installed in time for plaintiff to complete its subcontract by June 30, 1966 as required by the terms of the subcontract. The evidence is uncontradicted that Cox was not able to complete the building of the roadbed and the surfacing in the manner it had planned and that it suffered increased costs by reason of the delay.

As the trial court recognized, in the absence of a finding that the subcontract between plaintiff and Cox had been modified or changed, or breached in such a way as to relieve plaintiff of the duty imposed by the above quoted provision, the Judgment in favor of plaintiff was improper. (R. 552). In an effort to support the Judgment, the Findings of Fact contain the following statements which are not supported by competent evidence and are contrary to the evidence:

(a) “That Cox entered into a contract with Western Steel Company on January 10, 1966 *after having ordered certain structural steel from Western Steel prior thereto . . .*” (R. 624). (Emphasis added).

(b) “. . . that thereafter on or about March 2, 1966, *Western Steel Company and Cox, without Weyher's consent, modified the said steel agreement* by extending the time of fabrication, delivery and erection of steel until some later date subsequent to June 30, 1966, and *did further modify the schedule of fabrication, delivery and installation of the steel*, so that it became impossible for Weyher to complete its work by June 30, 1966;” (R. 625). (Emphasis added).

(c) “. . . that Cox was informed of the modified delivery and fabrication schedule by Western Steel and made no objection thereto, *thus agreeing to and permitting the steel to be delivered* and erected subsequent to June 30, 1966. . . .” (R. 625). (Emphasis added).

(d) “That Cox having ordered the steel and having agreed with Western Steel to the delayed schedule, made it impossible for Weyher to order the steel, to make sure that the steel would be taken care of in time and schedule it in accordance with the terms of the subcontract agreement so that Weyher could perform its work properly;” (R. 625).

(e) “. . . that Cox interfered with Weyher's work and thus prevented Weyher from performing under the terms of the subcontract by June 30, 1966;” (R. 625).

(f) “. . . that Cox had ordered the steel and by so ordering and agreeing to the new scheduling interfered with and made it impossible for Weyher to comply with the following provision of the subcontract:

‘Subcontractor of structural concrete will be responsible for ordering steel and making sure that the steel items are taken care of in plenty of time so as not to delay his contract. This will be made a part of the subcontractor’s contract.’” (R. 625, 626).

The Conclusions of Law contain the following statements which are not supported by the evidence:

(a) *That Cox Construction Company after entering into the Weyher Construction Company subcontract, interfered with and prevented Weyher from performing said subcontract by agreeing to an extension of time of performance under the Western Steel Company contract, knowing that said extension of time would interfere with Weyher’s performance; that said extension of the Western Steel performance was beyond the control of Weyher and was without Weyher’s consent; that said action was a breach of the Weyher subcontract and imposed a different and unanticipated condition upon Weyher’s performance, all of which was beyond the terms of the Weyher-Cox subcontract.*” (R. 627). (Emphasis added).

The Judgment in favor of plaintiff rests upon the foregoing Findings and Conclusions which hold, in effect, that Cox breached his contract with plaintiff by agreeing to a modification of the Western Steel agreement. If they are not supported by the evidence, then the Judgment should be reversed. Taking the evidence most favorable to plaintiff, as required on this appeal, the find-

ings and Conclusions clearly are improper and contrary to the evidence. The following analysis of the evidence will consider the indicated Findings and Conclusions:

Finding:

“That Cox entered into a contract with Western Steel Company on January 10, 1966, after having ordered certain structural steel from Western Steel prior thereto . . .” (R. 624).

Evidence:

There is no evidence that Cox ordered structural steel prior to January 10, 1966. Howard Jensen, Vice President of Western Steel, testified:

“Q. I have just one further question. When you first ordered the steel back in December, Mr. Jensen —

A. That was certain items, I might say.

Q. Those particular items. Was that pursuant to a call from Cox Construction Company?

A. Well, I'd say it was pursuant to our judgment that we were going to get — be successful in getting a contract, and we were very concerned about the availability in getting into the mill rolling schedules, and I might say we took a chance, however, in ordering before we had the contract, feeling sure we would get it.” (R. 243, 244).

Cox's president testified with respect to the time of ordering the structural steel:

"Q. Had you signed the bid proposal at the time you had the conversation with Mr. Weyher about it? (January 10, 1966)

A. No." (R. 318).

Exhibit 46 shows that Western Steel received the signed contract from Cox on or about January 12, 1966. Exhibit 36 shows that it was signed January 10, 1966. There is no competent evidence supporting this Finding of Fact.

Finding:

"... that thereafter, on or about March 2, 1966, *Western Steel Company and Cox, without Weyher's consent, modified the said steel agreement by extending the time of fabrication, delivery and erection of steel until some later date subsequent to June 30, 1966, and did further modify the schedule of fabrication, delivery and installation of the steel, so that it became impossible for Weyher to complete its work by June 30, 1966;*" (R. 625). (Emphasis added).

Evidence:

There is no evidence that Cox agreed to a modification of the Western Steel agreement by agreeing to an extension of time in the fabrication, delivery or installation of the steel. Regarding

the March 2, 1966 letter from Western Steel regarding delay in the steel, which plaintiff claims Cox agreed to, Mr. Jensen, plaintiff's own witness, testified:

"Q. You didn't ever talk to Mr. Cox about that schedule, did you?

A. No, I didn't talk to him about this schedule.

Q. You have no letter from him with respect to it, no memorandum?

A. No.

Q. You have no memorandum in your company files with respect to any approval by anybody of that schedule?

A. No." (R. 241, 242).

Mr. Jensen also said regarding any agreement by Cox to the letter setting the delayed dates:

"Q. After sending this letter, Mr. Jensen, did you hear anything from Cox in any way with reference to this schedule?

A. Well, during the course of this time we became aware of the fact that Mr. Weyher had negotiated a subcontract with Mr. Cox for doing the concrete work and that, therefore, the delivery of the steel would be of great interest to him, and we didn't have very much

contact with Mr. Cox regarding delivery from this time out, except for a letter we got from his office. I believe it was in August. Where he was urging us to deliver the last of the steel.

- Q. So in response to this designation of schedule you had no further contact of any kind, objection or otherwise, from Mr. Cox.
- A. I have no evidence in our file of any letters except the one I mentioned on this, and I don't recall having a telephone call from — or a personal call, from anybody from Cox Construction Company on this. Most of our dealings in coordination of this was done with the Weyher Construction Company on the delivery of this steel." (R. 226).

Furthermore, Mr. Jensen said:

- "Q. Mr. Jensen, did you have any additions or amendments to your agreement with Cox on this project?
- A. No. this is one of those projects there's no extras to the contract or amendments to the contract, and I'm happy to say." (R. 233).

* * *

- "Q. What I'm saying is that my understanding of the testimony was that you had initial contact with Cox but as soon as you knew Weyher had the bridges, then you worked with Weyher?

- A. After we found out that Bob Weyher was going to build the bridges we did our coordinating with him; that's correct." (R. 234).

There is no evidence that Cox ever agreed to a modification of the steel delivery schedule and, in the absence of such evidence, the Finding is incorrect. Since the Judgment rests on a Conclusion that Cox breached plaintiff's subcontract by agreeing to a modification of the Western Steel delivery schedule, and since there is no evidence of such an agreement of modification by Cox, the Judgment must be reversed.

Finding:

"... that Cox was informed of the modified delivery and fabrication schedule by Western Steel and made no objection thereto thus agreeing to and permitting the steel to be delivered and erected subsequent to June 30, 1966. . . ." (R. 625).

Evidence:

The evidence is clear that Cox did nothing upon receipt of the March 2, 1966 letter from Western Steel which set forth a delivery schedule. Cox did not respond because it felt that the delivery schedule of steel was the responsibility of plaintiff. (R. 370). However, under the circumstances in no event could the fact that Cox failed to respond be construed as an agreement by Cox to a delayed delivery and erection schedule as found by the Court. In fact, the evidence estab-

lishes that an objection or protest would have been meaningless because at that time Western Steel could have done nothing to alter the schedule. Mr. Jensen testified:

“Q. At any time after January tenth or eleventh or twelfth, or February 15, or any time between that general area of time and the first part of June after the steel had been delivered to plaintiff, did Weyher Construction Company ever contact you and ask you to expedite the Forest Street Bridge to move it ahead of your schedule?

A. I can't remember if he did, *but if he'd done I'd have had to tell him it was in vain* because we had this absolutely scheduled, our shipments from the mill in a certain order, and I think we at the beginning of this job made a statement that after we set the schedule up it would have to be followed.” (R. 239). (Emphasis added).

The absence of an objection of protest cannot be deemed to be an agreement where such objection or protest, if made, would have been completely unavailing.

Finding:

“That Cox having ordered the steel and having agreed with Western Steel to the delayed schedule made it impossible for Weyher to order the steel, to make sure that the steel would be taken care of in time and schedule it in accord-

ance with the terms of the sub-contract agreement so that Weyher could perform its work property;" (R. 625).

Evidence:

It is uncontested that plaintiff knew at the time it signed the subcontract agreement with Cox that Cox was going to enter into a purchase agreement with Western Steel, and plaintiff's President, in fact, placed long distance telephone call to Western Steel at the time plaintiff executed the subcontract to discuss with Western Steel the delivery dates of steel. (R. 83, 271, 272). Plaintiff knew from the outset that the steel was to be purchased from Western Steel, and the finding that by ordering the steel from Western Steel, Cox "made it impossible for Weyher to order the steel" cannot be supported. In addition, as noted above, Cox did not enter into any agreement with Western Steel approving a delayed schedule. This finding is nothing more than an effort by plaintiff to avoid a contractual responsibility which it knew to exist at the time the contract was signed and which plaintiff now claims prevented it from carrying out its responsibility.

Finding:

" . . . That Cox interfered with Weyher's work and thus prevented Weyher from performing under the terms of the subcontract by June 30, 1966;" (R. 625).

Evidence:

The record is void of any evidence that Cox interfered with plaintiff's work. As noted above, plaintiff's contention that Cox interfered with plaintiff's work by agreeing to a modification in the delivery of steel cannot be supported by the evidence.

Finding:

"... that Cox had ordered the steel and by so ordering and agreeing to the new scheduling interfered with and made it impossible for Weyher to comply with the following provision of the subcontract:

'Subcontractor of structural concrete will be responsible for ordering steel and making sure that the steel items are taken care of in plenty of time so as not to delay his contract. This will be made a part of the subcontractor's contract.' " (R. 625).

Evidence:

Here, again, the court found that by ordering the steel from Western Steel, Cox made it impossible for plaintiff to comply with the indicated provision of the subcontract. Again, it is noted that the subcontract, with the quoted provision, was signed by plaintiff at a time when plaintiff knew that Cox was purchasing the steel from Western Steel Company, and plaintiff signed the contract with that knowledge and still assumed the responsibility of making sure that the steel

was "taken care of in plenty of time so as not to delay his contract." Plaintiff testified with respect to the conversation with Cox on January 10, 1966:

"Q. Did you have any discussion at that time with reference to ordering that steel?

A. Yes.

Q. Can you give us that conversation?

A. Well, when I arrived Mr. Cox had the sub-contract, which we both signed, for the work on the concrete work, prepared. He prepared it in his office, I presume. At least he had it prepared to submit to me for my signature, and *as I reviewed it I noted the provision in there with regards to the steel, and as I was not buying the steel nor did I know what arrangements had been made with either of the steel suppliers, Gillmore Steel for the reinforcing steel or Western Steel for the structural steel, I inquired of him as to what arrangements and with whom he had made these arrangements.*

Q. And what did he say?

A. And Mr. Cox told me that there were agreements with both of these steel suppliers for the furnishing and erection of the steel and he would handle that item, he would pay for it, he would buy it from him, and that they would have it there in sufficient time for me

to do my work. But he merely wanted me to schedule and coordinate the delivery of the steel so that when we were in need of it the steel contractors, both Gillmore and Western would have sufficient notice so that they could get it to the job on time so that we wouldn't lose any time." (R. 81, 82). (Emphasis added).

As noted above, during the conversation plaintiff's president placed a telephone call to Western Steel with reference to the delivery of the steel. (R. 83). It is noted that plaintiff is not claiming, and the court did not find, that the quoted provision in the contract required only that plaintiff schedule and coordinate delivery of the steel. Plaintiff acknowledges and the Court by implication found that it was necessary to avoid the quoted provision of the subcontract by finding a breach of the provision by Cox. No such breach occurred. The court should not have made a finding that Cox's purchase of the steel from Western Steel Company was a breach of the agreement when plaintiff signed the agreement knowing that the steel was to be purchased from Western Steel. The finding that Cox agreed to new scheduling of the steel, as heretofore indicated, is contrary to the evidence.

Conclusion:

"That *Cox Construction Company* after entering into the *Weyher Construction Company* subcontract, interfered with and prevented *Wey*

her from performing said subcontract *by agreeing to an extension of time of performance under the Western Steel Company contract*, knowing that said extension of time would interfere with Weyher's performance; that said extension of the Western Steel performance was beyond the control of Weyher and was without Weyher's consent; *that said action was a breach of the Weyher subcontract* and imposed a different and unanticipated condition upon Weyher's performance, all of which was beyond the Weyher-Cox subcontract." (R. 627). (Emphasis added).

Evidence:

As indicated above, the evidence does not support the finding nor conclusion that Cox agreed to an extension of time of performance under the Western Steel contract, and in the absence of such evidence the Conclusion that there was a breach of the Weyher subcontract is improper. The Judgment, which rests upon that Conclusion, was improperly entered.

The Judgment entered by the trial court should be reversed. Since the evidence fails to establish any ground for avoidance by plaintiff of the subcontract provision placing responsibility for the steel upon plaintiff, the delay in the project caused by delay in delivery of the steel was the responsibility of plaintiff. The case should be remanded to the trial court with instructions to find that plaintiff was liable to Cox for any damages suffered by Cox resulting from that delay. The trial court should be further instructed to hold a hearing to determine the

amount of damage suffered by Cox by reason of such delay and to enter judgment pursuant to the findings resulting from such further hearing. In the alternative, the judgment should be reversed and the case remanded for new trial.

POINT TWO

THE FINDING OF THE JURY THAT COX WAS RESPONSIBLE FOR THE DELAY IN THE DELIVERY OF THE STRUCTURAL STEEL IS NOT SUPPORTED BY LAW OR BY THE EVIDENCE.

The evidence, as outlined above, fails to support the finding of the jury in answer to Special Interrogatory No. 1(b) that Cox had primary responsibility for the delay in the delivery in the structural steel. This finding forms a part of the basis for the Findings of Fact and Judgment entered by the court. Appellants will not repeat here the argument and evidence that Cox was not responsible for that delay, and the Court is referred to the argument under Point One above. The trial court failed to instruct the jury, as requested by defendants' Requested Instruction No. 5, that the subcontract provided:

“Subcontractor of structural concrete will be responsible for ordering the steel and making sure that the steel items will be taken care of in plant”

of time so as not to delay his contract. This will be made part of the subcontractor's contract."

The jury, in the absence of proper instructions with respect to the effect of such contractual provision, made a finding contrary to the terms of the written agreement. Under the terms of the subcontract, which plaintiff and the Findings of Fact and Conclusions of Law implicitly acknowledge was binding in the absence of a breach, the delay in the delivery of the structural steel was the responsibility of plaintiff. As a matter of law, the jury's verdict on the question 1(b) should be reversed.

POINT THREE

THE COURT AND JURY WERE IN ERROR
IN FINDING THAT PLAINTIFF WAS EN-
TITLED TO DAMAGES FOR DELAY IN
PERFORMANCE OF THE SUBCONTRACT
WORK IN THE AMOUNT OF \$1,226.85.

The court entered judgment over and above the contract price for damages claimed by plaintiff arising from the delay in the performance of plaintiff's subcontract. The court found:

"That by reason of Cox's interference with the Weyher subcontract and performance thereunder, Weyher was delayed and damaged in the performance of the subcontract work . . . in the amount of \$1,226.85;" (R. 626).

In this connection the court failed to instruct the jury concerning, and failed to take into consideration, the following provisions of the subcontract:

ARTICLE IX—OTHER SUBCONTRACTS

“... The contractor will not be responsible for any delays or interferences resulting from the acts or operations from other subcontractors or material suppliers.”

* * *

ARTICLE XIV—CLAIMS FOR EXTRA WORK OR DAMAGES

“... Any claim of the subcontractor for extra work and/or materials not so authorized, or for damages of any nature whatsoever shall be deemed waived by subcontractor unless written notice thereof is given within five days after the date of its origin.”

* * *

ARTICLE XV—BASIS AND SCOPE OF PAYMENT

“Payment will be made to the subcontractor ... at the price hereinafter specified, which price shall be accepted by the subcontractor as full compensation ... for all loss and damage arising out of the nature of the work aforesaid and for all risks of every description connected with the said work; also for all expense incurred by the subcontractor by or in consequence of the suspension or discontinuance of the work.”

* * *

ARTICLE XVI—DELAYS

“ . . . that the subcontractor will not be entitled to any extra compensation or advantages because of any such suspension or delay not specifically allowed and paid for by the owner.” (Ex. 2).

The court refused to instruct the jury with respect to any of the above provisions although requested to do so by defendants in Requested Instruction Nos. 3, 10 and 12. The damage claimed by plaintiff under the jury's findings was caused by a subcontractor or material supplier, Western Steel Company, and the claim for damages should have been barred under Article IX. In addition, there is no evidence that plaintiff gave written notice of its claim to Cox within five days after the date of the origin of the claim as required by Article XIV. In fact, plaintiff did not give notice of its claim until the Complaint in this suit was filed in December, 1966. (R. 216). Such claim for damages, therefore, should not have been permitted under Article XIV. In addition, the claim was barred under the provisions of Articles XV and XVI. No evidence justifying the avoidance of the above provisions was presented by plaintiff, and the Findings of Fact and Conclusions that the above quoted provisions were avoided are not supported by competent evidence.

POINT FOUR

THE COURT FAILED TO INSTRUCT THE
JURY PROPERLY AND BY IMPROPERLY

REFUSING DEFENDANTS' REQUESTED INSTRUCTIONS, THE COURT FAILED TO PRESENT DEFENDANTS' THEORY OF THE CASE TO THE JURY.

The court erred in failing to grant defendants' Requested Jury Instructions. Defendants requested the following instructions from Jury Instruction Forms Utah: 1.1 through 1.10, inclusive, 1.13, 2.1, 2.3, 3.1, 3.2, 3.6 and 3.9. Such instructions were necessary to give the jury a proper view of the functions of the court, the parties, counsel and the jury in considering the case and an understanding of the terms used. Under defendants' theory of the case, plaintiff was bound by the subcontract provision which required the plaintiff be responsible for the delivery of the structural steel. Defendants' asked in Requested Instruction No. 5 that the court instruct the jury in connection with this provision since it was controlling on the issue between the parties. The court's refusal to give Requested Instruction No. 5, or any instruction with reference to the provisions of the said subcontract agreement, failed to give the jury an adequate basis upon which to consider the evidence. Furthermore, the court's refusal to give Requested Instruction No. 3, 10 and 12 with reference to the extra claims for damage by plaintiff placed the jury in the position of not knowing what the legal effect of the contract was between plaintiff and Cox.

The instructions given by the court were totally inadequate to instruct the jury on the law of the case and the function of the jury. In the absence of an Instruction of the definition of preponderance of the evidence, the jury's answers may have been made without consideration of whether plaintiff met its burden of proof.

The instructions, taken as a whole, and the special verdict, taken as a whole, failed to present the counterclaim of Cox in a fair manner. The instructions and the special verdict laid undue emphasis on the claims of plaintiff. For example, in the special verdict, question 2, question 3, question 5 and question 7 all were phrased in the context of "Cox's failure." Questions 4 and 6 were omitted by the court, leaving the jury no questions to answer with reference to the specific counterclaims of Cox. In presenting the detail of plaintiff's claim to the jury in the special verdict without any detail as to the counterclaim of defendant Cox, the court erred by both unfairly refusing to present the claims of Cox and by unduly emphasizing the claims of plaintiff. There was no motion or ruling by the court that the counterclaim of Cox was barred as a matter of law from consideration from the jury. The instructions and special verdict were unfairly weighted against defendants. Instruction No. 5 is demonstrative of the prejudicial presentation of the claims of the parties. (R. 614).

The court should have submitted to the jury the special interrogatories suggested by defendants which

presented the claims of both plaintiff and defendants in detail. (R. 604, 605, 606, 607).

Under the instructions and the special verdict the jury could not give fair consideration to the claims of the parties and defendants were thereby deprived of a trial of the factual issues by the jury under proper legal instructions.

POINT V.

THE COURT ERRED IN DENYING DEFENDANTS' MOTIONS FOR DIRECTED VERDICT, JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL.

Under the evidence and for the reasons hereinabove set forth the Court erred as a matter of law in denying defendants' motions for directed verdict, judgment notwithstanding the verdict and new trial.

CONCLUSION

It is respectfully submitted that for each and all of the reasons set forth, the judgment entered by the trial court should be reversed and the case remanded for further proceedings as hereinabove requested in "Relief Sought on Appeal."

Respectfully submitted,

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