1965

Weyher Construction Company v. Utah State Road Commission : Brief of Respondent

N THE SUPREME COURT
F THE STATE OF UTAH

EYHER CONSTRUCTION COMPANY,
Plaintiff and Appellant,

— vs. —

TAH STATE ROAD COMMISSION,
Defendant and Respondent.

BRIEF OF RESPON

Appeal From a Judgment of the Th
District Court for Salt Lake C
Honorable Merrill C. F

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IN THE SUPREME COURT OF THE STATE OF UTAH

WEYHER CONSTRUCTION COMPANY,
Plaintiff and Appellant,
— vs. —
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Defendant and Respondent.

Case No. 10307

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

Weyher Construction Company, Appellant, brought this action in the District Court against the Utah State Road Commission when it incurred extra costs in the amount of $15,667.12 due to alleged inadequacy of plans and specifications drawn up by the Utah State Road Commission for the construction of a storm sewer, and for $1,850.00 withheld by the Road Commission as liquidated damages. The State Road Commission contended that the plans and specifications were perfectly and completely adequate, and that the Appellant was not entitled to any additional costs over and above the contract price,

and that the Road Commission was entitled to $1,850.00 as liquidated damages in that the Appellant did not complete the contract on time.

DISPOSITION IN LOWER COURT

The Trial Court, after hearing all the evidence, held that the plans and specifications were adequate, and that the modifications of the plans were made at the request of the Appellant for its sole benefit. The Trial Court accordingly awarded judgment in favor of the Road Commission, as to the extra costs incurred, of no cause of action, and gave judgment to the Appellant in the sum of $1,850.00, being the amount withheld by the Road Commission as liquidated damages.

RELIEF SOUGHT ON APPEAL

The Appellant, Weyher Construction Company, seeks reversal of the judgment of the Trial Court rendered in favor of the Road Commission of no cause of action in regard to Appellant's claim for extra costs.

STATEMENT OF FACTS

The Respondent agrees with the Appellant's Statement of Facts, except for the following particulars:

1. The Appellant's claim that the 60-inch drain was inadequate to handle the water, and, therefore, the plans and specifications were inadequate, is not supported by the evidence produced in the trial. The evidence shows that the 60-inch drain was adequate to handle the water

and would have handled the water, if the diversion had been properly constructed in the first instance. (R. 132, 170, 183, 217 and 231) and (Exhibit 5-P).

The facts further show that the construction work was carried out substantially as contemplated under the original specifications; that is, in the dry, using the 60-inch line as a diversion. (R. 107.)

2. The Respondent further states that the facts indicate any changes that were made in the specifications were made at the sole request and for the sole benefit of the Appellant, and, if the changes were accepted, they were to be made at no cost to the Respondent. (Exhibit 5-P) and (R. 133.)

3. Appellant's Statement of Facts in regard to the rains as causing flow of waters down a storm drain (found in the first paragraph of page 7 of Appellant's brief), has no particular value in regard to this law suit, as the value of Exhibits 16-P and 17-P showing what is the usual summer thunder shower, is very remote in that the question of "what creates a flood" depends upon how much water is deposited, in what area and during what period of time, and there was no competent evidence placed in the Record as to how much water was deposited, on what area, at any particular time.

As further facts, the Respondent states that this contract was entered into to replace a City storm drain under an agreement with the City wherein the City requested the special specification under consideration in the law suit. (R. 239.)

This construction was made as a part of the Interstate road construction, because of the need to modify the storm drain in the area of Interstate road construction at 13th South Street. The special specification, as found on Sheet 10 of the State's Standard Specifications (Exhibit 1-P) was specifically requested under the Respondent's agreement with the City, and was made on the basis of the City's representations and investigations that the 60-inch parallel storm drain would handle the diversion of the water expected to flow through this storm drain during the months of August, September and October. (R. 239 and 245) and (Exhibits 14-P. and 15-D.)

ARGUMENT

POINT I

THE FINDING OF THE COURT THAT THE PLANS AND SPECIFICATIONS FOR THE CONSTRUCTION OF THE STORM DRAIN WERE ADEQUATE, WAS PROPER AND SUPPORTED BY THE EVIDENCE ADDUCED DURING THE TRIAL.

There was testimony from all of Respondent's witnesses that the original plans and specifications were adequate, and that the construction could have been completed under the original specifications, if the contractor had built his No. 3 dam first and had not been so timid in regard to getting the construction underway. (R. 132, 170, 183, 217 and 231) and (Exhibit 5-P.)

In reviewing the Lower Court's determination, it is

the duty of the Supreme Court to review the evidence, and all inferences fairly to be drawn therefrom, in the light most favorable to the Findings and Judgment. It is generally understood that the Supreme Court will not overturn the Lower Court's Findings of Fact where there is substantial evidence in the record to support such findings.

It seems to be the Appellant's contention that the specifications, as found on Sheet 10 of Exhibit 1-P of the State's Standard Specifications, should take precedence over all other specifications in the contract. The Respondent contends that the contract should be read as a whole and all specifications should be taken into consideration in the interpretation of the contract.

Section 1-2.5 of the State's Standard Specifications (Exhibit 3-D) provides as follows:

> "EXAMINATION OF PLANS, SPECIFICATIONS, SPECIAL PROVISIONS AND SITE WORK. The bidder is required to examine carefully the site of the proposed work, the proposal, plans, specifications, special provisions and contract forms before submitting a proposal. It is mutually agreed that submission of a bid shall be considered prima facie evidence that the bidder has made such an examination and is satisfied as to the conditions to be encountered in performing the work and as to the requirements of the plans, specifications, supplemental specifications, special provisions, and contract."

This section requires that the contractor be satisfied with the conditions that he is to meet in the execution of

his contract. The contractor, himself, admitted that he made such an examination, and was satisfied with such conditions, and concluded that it would work. (R. 91.)

Respondent contends that the original plans and specifications were complete and that the contractor could have conducted the execution of the contract in accordance with such specifications.

Section 1-9.2 of the State's Standard Specifications (Exhibit 3-D) provides that the contractor shall accept the compensation as set out in the contract for all loss or damage arising from the nature of the work or from the normal action of the elements, or from any unforeseen difficulties which may be encountered during the prosecution of the work. This section of the contract provides that the type of damage for which the Appellant is attempting to recover as costs is contemplated by the parties to be a part of the original contract price.

Section 2-3.1 of Exhibit 3-D provides that the contractor shall include all necessary equipment and the construction of all cribs, cofferdams, caissons, unwatering, etc. in his contract price in the carrying out of any excavation. The Appellant now seeks to recover extra costs for the unwatering or the carrying out of its construction in a watered situation; whereas, it was its requirement under the contract to keep the construction area dry. This requirement was to be carried out for the compensation as set out in the contract.

It seems to be the contention of the Appellant, throughout its brief, that the special construction specifications, as found on Sheet 10 of Exhibit 1-P, supersedes and takes precedence over all other provisions of the contract, and provides that the diversion shall be accomplished by the method as outlined in the specifications, and is tantamount to an unqualified representation and warranty that the 60-inch diversion drain and dam were adequate. Of course, it is the contention of the Respondent that the 60-inch diversion drain was adequate, and, in fact, was the sole method of diversion during the period of construction, and if the dam had been properly constructed to begin with, the problem would not have arisen. However, even if Appellant's contention has some merit that the diversion did not work, the language of the specifications should be examined. The language provides that it *may be accomplished*. The ordinary interpretation of the word "may" indicates the impression of alternatives and also gives the impression of choice. It was given as a suggestion and alternative and not as a requirement.

In the case of *MacArthur Brothers Company* v. *United States*, 258 U.S. 6, where a construction company contracted with the United States Government to construct a portion of a canal, it was required to do the work in the dry. There was a similar condition, as we have in this contract under consideration at present, in that the construction company was required to inform itself of the conditions incidental to the construction. Leakage of water through an adjacent pier caused the work to be

done in the wet with additional costs. The court in denying the contractor the extra costs states:

> "In the case at bar the Government undertook a project and advertised for bids for its performance. There was indication of the manner of performance but there was no knowledge of impediments to performance; no misrepresentation of the conditions, exaggeration of them nor concealment of them, nor, indeed, knowledge of them. To hold the Government liable under such circumstances would make it insurer of the uniformity of all work and cast upon it responsibility for all of the conditions which a contractor might encounter and make the costs of its projects always an unknown quantity."

This particular case is very much in point with the situation under consideration and distinguishes some of the cases as relied upon by Appellant in its brief. It distinguishes *Hollerback* v. *United States,* 233 U.S. 165, wherein the Government presumed to speak with knowledge and authority. It distinguishes *Christie* v. *United States,* 237 U.S. 234, wherein the Government made a deceptive representation; and it distinguishes *United States* v. *Atlantic Dredging Co.,* 253 U.S. 1, wherein the representations of the Government were deceptive.

In *MacArthur Brothers Co.* v. *United States,*(supra), as in the case under consideration, there was no finding of deception or misrepresentation, nor presuming of the Government to speak with knowledge or authority. In fact, in the case under consideration, the Court made the determination as a matter of fact that there were no misrepresentations, and that the parties had equal knowledge

of the conditions. This determination by the Court is strongly objected to by the Appellant as being immaterial. It is hard to see why such a finding would be "immaterial," when it would almost be necessary to have a finding that the Respondent presumed to speak with knowledge and authority, or that there was a misrepresentation, in order to hold the Respondent liable under the Appellant's legal theory.

The finding, as set out in the *MacArthur Brothers* case (supra), is supported by the following cases: *Scherrer et al.* v. *State Highway Commission of Kansas,* 80 P. 2d 1109; *Construction Aggregate Corp.* v. *State of Connecticut,* 170 Atlantic 2d 279; *Furton et al.* v. *City of Menasha,* 71 F. S. 569; *City of East Peoria* v. *Coleanni,* 78 N.E. 2d 809; *Shappiro* v. *Goldberg,* 192 U.S. 232; *Wilson* v. *Cattle Ranch Co.,* 73 Fed. Rep. 994; *Spearm* v. *United States,* 248 U.S. 136, and *International Contracting Co.* v. *Lamont,* 155 U.S. 303.

POINT II.

THE FINDING BY THE TRIAL COURT THAT THE CHANGE IN PLANS AND SPECIFICATIONS WAS REQUESTED BY WEYHER WAS PROPER AND ADEQUATELY SUPPORTED BY THE EVIDENCE.

A review of the letters and memoranda, as set out in Exhibit 5-P, clearly shows the Respondent's intention to assume no affirmative liability by reason of any change in plans and specifications, and that the Respondent allowed the Appellant to make such change solely

for the Appellant's benefit — and at its request. (R. 101, 102 and 133.)

At no time did the Respondent acknowledge that the original plans and specifications were inadequate, and all of Respondent's letters and memoranda, as set out in Exhibit 5-P, indicate that the Respondent felt the original plans and specifications should be complied with, but that they would consider the change in the plans and specifications, as requested by the Appellant, if there were no additional costs to the Respondent. (R. 134.)

CONCLUSION

The whole basis of the Appellant's dissatisfaction with the Trial Court's ruling appears to be its dissatisfaction with the Trial Court's Findings of Fact, wherein the Trial Court found that the plans and specifications for the construction of the storm drain were completely adequate, and that there was no misrepresentation in the plans and specifications by the Respondent; and that the Appellant had the same knowledge, or the means to gain the same knowledge, as the Respondent.

Further, the Court found that the Respondent allowed a change in the plans and specifications, at the request of the Appellant, as an alternate to the plans shown in the original contract.

The Appellant argues that the plans and specifications were inadequate; that the question as to whether or not there was any misrepresentation in the plans and

specifications is immaterial; and that the Court erred in holding that the change in the plans and specifications was requested by Weyher. Yet, nowhere in Appellant's brief is there any argument that the Court's Findings of Fact are not supported by competent evidence.

The Appellant continues to argue the facts presented in the Trial Court and seems to ignore the fact that the Trial Court ruled against them in regard to these facts. The Appellant appears to argue that it is entitled to recovery as a matter of law on the basis that its facts are correct; whereas, the determination of the Court was that its facts were not correct — that the plans and specifications were adequate; the change in the plans was requested by Appellant, and there was no misrepresentation in the plans and specifications. All of these findings of fact are adequately supported by what the Respondent considers the great weight of evidence presented during the trial of this matter.

If the contractor had built his third dam first and not have been so timid in proceeding with the construction, as outlined in the contract, he could have completed the job, as originally contracted for, without any additional costs. Instead, the contractor wanted assurance or insurance that he would suffer no loss by reason of possible unforeseen difficulties. The State cannot guarantee that the contractor will make a profit, nor that the contractor will not face unforeseen difficulties in the construction of the project.

"To hold the Government liable under such circumstances would make it insurer of the uniformity of all work and cast upon it responsibility for all of the conditions which a contractor might encounter and make the costs of its projects always an unknown quantity." (MacArthur Brothers Co. v. United States, supra.)

Respectfully submitted,

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