1965

# Fred D. Hudson, Dba Hudson Investment Co. v. Bettilyon's Inc., dba Bettilyons Construction Company : Appellant's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH



FRED D. HUDSON, dba Hudson Investment Co.,

*Plaintiff and Appellant,*

vs.

BETTILYON'S INC., a corporation, dba Bettilyons Construction Company,

*Defendant and Respondent.*



Case No. 10378

## APPELLANT'S BRIEF



Appeal from the [illegible]
Third Judicial District [illegible]
The Honorable Stewart M. [illegible]

VERDEN E. BETTILYON
*Attorney for Defendant and Respondent*
336 So. 300 East
Salt Lake City, Utah

JOHN ELWOOD [illegible]
*Attorney for the Plaintiff*
1243 East 2100 South
Salt Lake City, Utah

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### STATEMENT OF THE KIND OF CASE

This is an action brought by the Plaintiff to collect funds due to him under a contract originally executed between the Defendant and one Lynn Gowans, dba Structural Components Company, for installation of a roof structure on a building at 2220 South 2nd West, Salt Lake City, Utah. This contract was assigned by Lynn Gowans to the Plaintiff. The Defendant separately undertook and agreed to make "all checks and payments due on the above job payable to Hudson Investment Company and Structural Components Company, together, and that no payments on this job would be made in any other manner.' The Plaintiff claims to be the beneficiary of

the orginal contract and accordingly to be entitled to the proceeds. The Plaintiff claims also to be entitled to its damages on a different legal theory, namely because the Plaintiff and Defendant entered into a direct contractual relationship regarding the manner in which the checks would be made payable and that the breach of this contractual agreement by the Defendant and respondant has given rise to the damages which the Plaintiff claims he is entiled to recover.

## DISPOSITION IN LOWER COURT

After hearing the evidence, the Honorable Judge Stewart M. Hanson issued a memorandum decision on March 25, 1965, denying to the Plaintiff his sought-after relief on the grounds that Gowans assigned the "earnings" only, that the Plaintiff was paid; and that in any event, the Defendant would be entiled to the benefit of Rule 13 (j) of the Utah State of Civil Procedure. The judgment of April 5, 1965, followed the same thinking as the memorandum decision and granted to the Defendant judgment of no cause of action.

## RELIEF SOUGHT ON APPEAL

The Plaintiff seeks to have the judgment of the lower court reversed and to have judgment entered his favor and against the Defendant in pursuance of the prayer of his complaint together with the costs of this appeal.

## STATEMENT OF FACTS

Based upon Exhibit 4, and not upon any independent knowledge of the Plaintiff, it appears that Bettilyon

Construction Company, the general contractor for Freeway Industrial Park, had apparently undertaken to construct an office and warehouse at 2220 South 2nd West, Salt Lake City, Utah.

On or about the 28th day of September, 1962, Bettilyon Construction Company entered into a sub-contract agreement with Lynn Gowans dba Structural Components Company, for the construction of a Glu-Lam roof structure, complete as "Shown on plans" and for furnishing other items, and services as provided in Paragraph No. 2 of said agreement. The general contractor agreed to pay the sub-contractor the sum of $30,482.00 for his services.

On or about the 25th day of October, 1962, the sub-contractor ran short of cash and came to the Plaintiff to see if the Plaintiff would advance him some money. After exhibiting Exhibit D-4 to the Plaintiff, Mr. Gowans persuaded the Plaintiff, after some discussion, that a loan of $3,750.00, based upon the security of the sub-contract with Bettilyon's Inc. would be a sound investment.

Mr. Gowans was not a credit-worthy individual, so the requested advance was initially declined, however, Mr. Gowans persisted and was successful in obtaining the signature of Mr. B. Lue Bettilyon on the document marked Exhibit P-9 in this case, entitled "Assignment of Earnings." After two or three attempts, Mr. Hudson was able to reach Mr. Bettilyon to verify that he, Mr. Bettilyon had signed this document. (P-9)

Later on, a partial disbursement of $15,300.00 was made by Bettilyon's on the contract. The disbursing check (Exhibit D-2) was made payable to Structural Com-

ponents and Hudson Investment Company, and upon Gowans insistance that he needed all of the money, he induced the Plaintiff to endorse the check to him without receiving any portion of the proceeds. The Plaintiff was assured that this $15,300.00 was only part payment; that it was needed to meet the payroll; that the job would be completed shortly and that the Plaintiff would be paid out of the final payment on the contract. (see page 6 of the transcript) The Plaintiff had already verified that no money previous to this check had been disbursed on the contract (see Page 4 of the Transcript). This would have meant that at the time the first check was released that there was $15,182.00 still owing on the contract to the Plaintiff and Gowans by the Defendant.

Incidently, Gowans obtained an additional loan of $2,150.00 from the Plaintiff on November 29, 1962, in order to meet the payroll on this very job. Since this second note was paid directly by Gowans, by Mr. Gowan's check, it does not enter into this law suit, even though it was also secured by an assignment of the same contract. (See Exhibit D-10)

There is in evidence (Exhibit D-8) a so-called "Notice of Lien." There may be two schools of thought as to whether this Exhibit is competent evidence to prove the facts which appear on its face. But giving the Defendant every benefit of the doubt, it appears that commencing at some time between November 12, 1962, and December 12, 1962, the first and last dates mentioned on the Notice of Lien, that General Builders Supply Company, Inc., delivered some materials to Lynn Gowans which were used on the subject job for which Mr. Gowans did not pay completely.

Mr. Gowans paid off part of the lien himself, however, (See Transcript, Page 18, Line 5) because Bettilyons was able to get a full release of that lien from General Builders Supply for only $15,186.06.

There is on the reverse side of the contract a paragraph, Number 13, which provides inter alia "the Subcontractor agrees to satisfy immediately any lien or encumbrance . . . and to indemnify and save harmless the Contractor from and against any and all liens, suits, claims, actions, losses, costs, penalties, and damages of whatsoever kind of nature, including attorney's fees, etc."

The reverse side of the contract bears no signature, also the phrase on the face of the contract which makes reference to the reverse side of the contract appears underneath the signatures of the parties. Whether or not the reverse side of the sub-contract agreement forms a part of the Bettilyons-Gowans contract, the Defendants are claiming the benefits Paragraph 13 of the same in avoiding payment to the Plaintiff.

## ARGUMENT

### POINT I

### THE PARTIES INTENDED TRI-LATERALLY THAT THE PLAINTIFF WOULD BE THE JOINT PAYEE OF ALL GROSS PROCEEDS PAYABLE UNDER THE TERMS OF THE CONTRACT.

Since this is a factual conclusion, no cases are cited. This proposition rests upon logic and good sense, and not law, and the only law that can be cited on this point

is that the courts will lend to words their ordinary and usual, not technical, meaning in interpreting contracts, and further that the intent of the parties may be derived from their over-all understanding and their actions as well as the singular meaning of words used in expressng an agreement.

True, the asignment is couched in words which say that Gowans "assigned all my (his) earnings." Taken by itself, the word "earnings" lends itself to a variety of meanings. The agreement was drafted by laymen, apparently by Mr. Gowans himself, to which Mr. Bettilyon added the second paragraph before signing.

Had the parties used the words "gross receipts" or "net profit" there could be no room for argument, but since they didn't, the problem becomes one of second-guessing the intent of the parties at the time the transaction was negotiated.

Black's Law Dictionary defines "Earnings" as:

> "That which is earned; money earned; the price of services performed; reward; the reward of labor or the price of personal service performed, the reward for personal services, whether in money or chattels, the fruit or reward of labor; the fruits of the proper skill, experience, and industry; the gains of a person derived from his services or labor without the aid of capital; money or property gained or merited by labor; service, or the performance of something; that which is gained or merited by labor, services, or performances. Saltzman v. City of Council Bluffs, 214 Iowa 1033, 243, N. W. 161, 162."
>
> *"Income" is synonymous with "earnings."* State ex rel. Froedtert Grain and Malting Co. v. Tax Com-

> mission of Wisconsin, 221 Wis. 225, 265 N. W. 672, 673, 104 A. L. R. 1478 (Emphasis mine) (Earnings are)
>
> "Either gross or net earnings" Springfield Coal Mining Co. v. Industrial Commision, 126 NE 133, 22 ALR 859."

Black's Law Dictionary goes on to cite cases which define "gross earnings" and which define "net earnings" but leaves us with the conclusion that the general term 'earnings," means *either* gross *or* net earnings. Also, if "earnings" is synonymous with income, it is also synonymous with receipts.

Mr. B. Lue Bettilyon gave some interesting testimony to the effect that Mr. Gowans' profits on this job would be about 25% of the gross. However, this don't seem to be a factor at the time he issued the $15,300.00 check to Mr. Gowans and Mr. Hudson on December 20, 1962. The "net Profit" interpretation of "earnings" didn't seem to enter anyone's mind at this time, and having seen the willingness of Mr. Bettilyon to abide by his original agreement, Mr. Hudson was willing to wait for the second installment to get his money from Mr. Gowans. Obviously, each party is attempting, on hindsight, to persuade the court to adopt the meaning of "earnings" most favorable to its respective position, since the loser must look to Mr. Gowans to be made whole, and since Mr. Gowans has taken bankruptcy, the only hope of effecting a recovery is upon the basis that Mr. Gowans did not include Bettilyon's Inc. as one of his creditors, and that the indemnity agreement is still good, a fact not disclosed by the record.

Furthermore, the "gross receipts" definition, as opposed

to the "net profit" definition of earnings, is bolstered by the somewhat redundant, but meaningul language of the next paragraph, which says that "Bettilyon Construction Company agrees to make all checks and payments due on the above herein described job payable to Hudson Investment Company and Structural Components Company, together, and that no payments on this job will be made in any other manner." (See Exhibit P-9)

It will be argued later that this second paragraph forms an independent, enforceable contract, but for the purpose of clarifying this point, its importance is in lending emphasis to the intent of the parties that the gross proceeds would be paid to the joint order of the Plaintiff and Mr. Gowans.

## POINT II

## THERE WAS A SEPARATE, VALID, AND ENFORCEABLE CONTRACT BETWEEN THE PLAINTIFF AND DEFENDANT IN THIS ACTION.

Strangely enough, the obligor under the contract with Gowans obligated itself to the Plaintiff by an independent contract. This is not usual in assignment situations. All that usually happens is that the benefits of a contract are assigned, and the obligor is notified of the assignment. This is all that is necessary to vest in the assignee the rights of the assignor. However, in the instance, probably as an abundence of caution, the assignee, Fred D. Hudson, procured from B. Lue Bettilyon, the President of Bettilyon's Inc., not only an assent but also an independent agreement that *all* (not just some) checks and pay-

ments. . . . would be made payable to Husdon Investment Company and Structural Components Company together.

All that is necessary to give rise to a cause of action to enforce such an agreement is the capacity of the parties to contract, a meeting of the minds, a valid consideration, a breach, and damages. All the elements of a separate contract are present here, and need not be belabored. The parties had an unquestioned abilty and capacity to contract. The meeting of the minds is in writing. The Plaintiff was induced to part with his money based upon the agreement with Bettilyon's, Inc., Bettilyons breached its contract to Hudson's damage, as claimed.

## POINT III

## THE PLAINTIFF NEVER RECEIVED PAYMENT OF THE NOTE IN QUESTION.

The trial court held, as one of the reasons for its decision, that the Plaintiff had been paid. The basis of this conclusion of fact is not entirely clear. It is possible that there was confusion about the fact that there were two notes. The second, smaller, note was admittedly paid. That isn't what this law suit is about. It is about the first note, the $3,750.00 note, not the $2,150.00 note. It could also be that some value is placed on the fact that Mr. Hudson endorsed the first $15,300.00 check. There is some confusion as to whether Mr. Husdon and Mr. Bettilyon made contact on this occasion (the contact with Mr. Bettilyon having been handled by Dave Watkiss, Mr. Hudson's attorney) but there can be no argument with the fact that Mr. Hudson received no part of the proceeds of the first check. Both Mr. Hudson and Mr. Gowans testified to that, and there is not one iota of evidence to

sustain a contrary position. This fact stands unrefuted. Payment or non-payment is a fact and is not something akin to hocus-pocus which may be inferred from endorsement of a check. An endorsement may be some evidence of payment, but certainly any presumptions that may arise therefrom are rebuttable, and having clearly rebutted the same, the fact of non-payment is unassailable.

## POINT IV

## THE PLAINTIFF'S RECOVERY IS NOT BARRED BY RULE 13 (j) OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 13(j) gives some protection to an obligor against the claims of an assignee if the obligor had a claim, counterclaim, or cross claim against the obligee-assignor *at the time of or before the notice of assignment.* No one argues with this proposition. It simply doesn't apply to the facts of this case.

The Defendant argues that since Mr. Gowans didn't pay General Builders Supply Company, Inc. for some of the materials that were used on the job, that it had a claim against Mr. Gowans under paragraph 13 of the sub-contract agreement. While there may still be some argument as to whether the back side of this agreement, which begins with the caption "The Subcontractor Agrees as Follows", but which bears no signature, is a part of the contract, for the purpose of argument, assume that it does form a part of the agreement between Bettilyons and Mr. Gowans. The only defect in the Defendant's reasoning is the timing. The

cause of action by Bettilyon's against Mr. Gowans did not begin to accrue until November 12, 1962. They probably didn't know about their cause of action until the notice of lien was recorded on February 18, 1963, otherwise they wouldn't have paid Mr. Gowans $15,300.00 on December 20, 1962. Even then it is doubtful. But sometime prior to April 8, 1963, they must have discovered it (the date of the release), and paid the same. Had Mr. Gowans not assigned his contract to Mr. Hudson and had Bettilyon's not agreed to make all checks jointly payable to Mr. Gowans and Mr. Hudson, there would be less question about the right of Bettilyons to withhold this money from Mr. Gowans. Even if their indemnification agreement were no good, they would be protected at common law by some other rule against any claims of Mr. Gowans.

Here we have a different situation however. There are rights of third parties intervening. That is the reason for the language of the rule, establishing a cut-off date for claims, etc., against the assignor. This cut-off date is the time of or before notice of assignment. A simple summary of the sequence of events will establish clearly that there was no set-off, claim, or counterclaim against Mr. Gowans at the time of the assignment. Mr. Hudson's transaction with Mr. Gowans and Bettilyons was on October 25, 1962. The cause of action in favor of Bettilyons against Mr. Gowans began to accrue on November 12, 1962, and had not fully accrued until December 12, 1962, and had not become a cause of action until February 18, 1963. The counterclaim, even if valid, is simply too late to afford the Defendant any protection under Rule 13 (j).

## CONCLUSION

It is respectfully submitted that the judgment of the trial court is erroneous on all three theories and that the Plaintiff is entitled to judgment against the Defendants as prayed, together with the costs of the appeal.

/S/ .....

John Elwood Dennett, Attorney for Plaintiff and Appellant,

1243 East 2100 South, Salt Lake City, Utah

## CERTIFICATE OF MAILING

Mailed 2 copies of the foregoing to Verden E. Bettilyon, Attorney for Defendant-Appellant, 336 South 300 East, Salt Lake City, Utah, this ..... Day of August, 1965.

/S/ .....