1965

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

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 Bettilyon's Construction Company,

Defendant and Respondent.

No. 10378

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court for Salt Lake County
Honorable Stewart M. Hanson, District Judge

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DUPLICATE

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STATEMENT OF THE KIND OF CASE

This is an action brought by the Plaintiff to collect the balance due on a promissory note, secured by an Assigment of Earnings to become due from a subcontract between Defendant, Bettilyon Construction Company, and one, Lynn Gawan, d/b/a Structural Components Company, for the installation of a roof structure on a building located at 2220 South 2nd West, Salt Lake City, Utah. The Defendant made one pay-

ment to the Plaintiff under the Assignment, in the amount of $15,300.00, but prior to the time when the last payment came due, a lien in the amount of $17,879.78 was filed against the building for materials furnished to the construction by General Builders Supply Company, Inc. Bettilyon Construction Company paid the final payment to General Builders Supply, Inc., and obtained a release of this lien and the Plaintiff now claims that he is entitled to have his promissory note paid by the Defendant, for its refusal to make the final payment to the Plaintiff in accordance with the Assignment of Earnings.

DISPOSITION IN LOWER COURT

After hearing the evidence, the Honorable Stewart M. Hanson issued a Memorandum Decision on March 25, 1965, dismissing Plaintiff's Complaint, with prejudice, on the following three grounds:

1. The Assignment was an Assignment of Earnings only.

2. That the Plaintiff had been paid by receipt of a check of $15,300.00.

3. That the Defendant was entitled to offset any amounts due Gawan under Section 13 (j) of the Utah Rules of Civil Procedure.

RELIEF SOUGHT ON APPEAL

The Defendant seeks to have the Judgment of the Lower Court sustained.

STATEMENT OF FACTS

Defendant agrees with Plaintiff's second paragraph in his Statement of Facts, but the remainder of the Statement contains information not material to the case or is argumentive. Therefore, Defendant chooses to summarize the facts of the case as follows:

Bettilyon Construction Company, Defendant and Respondent (herein referred to as "Defendant"), was the General Contractor for the construction of an office and warehouse building for the owner, Freeway Industrial Park, a corporation. On September 28, 1962, Defendant entered into a sub-contract agreement with Lynn Gawan, d/b/a Structural Components Company (Exhibit D-4), for the furnishing of labor and materials for the installation of a "glu-lam" roof structure, for a total contract price of $30,482.00.

In the latter part of October, 1962, Gawan approached Plaintiff to borrow money and proposed to assign the sub-contract as security. On or about October 25, 1962, Lynn Gawan presented the "Assignment of Earnings" (Exhibit P-9) to B. Lue Bettilyon, President of Bettilyon Construction Company, for signature (T-38). The first and third paragraphs of the "Assignment of Earnings" were prepared in the office of the Plaintiff (T-63). The second paragraph was added by Mr. Bettilyon prior to his signature on the document (T-59).

Between the dates of November 12, 1962 and December 26, 1962, General Builders Supply Com-

pany, Inc., furnished materials to the building project, ordered by Lynn Gawan, at a total valuation of $17,-879.78, but nothing was paid on this account by Lynn Gawan.

On December 20, 1962, Defendant issued a check for part payment on the sub-contract, made payable jointly to Structural Components Company and Hudson Investment Company (Exhibit D-2). The check was endorsed by Hudson Investment Company, by Fred D. Hudson. On February 19, 1963, General Builders Supply Company, Inc., filed a lien against the construction property, in the amount of $17,879.78. When Lynn Gawan refused to discharge the said lien, Bettilyon Construction Company issued a check to the said lien claimant, in the amount of $15,182.00 (Exhibit D-3) and obtained a release of the lien (Exhibit D-7).

Plaintiff now claims that the check (Exhibit D-3) should have been made payable to Plaintiff in accordance with the terms of the Assignment.

POINT 1.

POINT 1. THE PARTIES DID NOT INTEND TRI - LATERALLY THAT THE PLAINTIFF WOULD BE THE JOINT PAYEE OF ALL OF THE PROCEEDS TO WHICH THE SAID SUB-CONTRACTOR WAS ENTITLED UNDER THE TERMS OF

THE CONTRACT, BUT ONLY TO THE EARNINGS OF THE SUB-CONTRACTOR.

The Plaintiff, in his argument, infers that the word "earnings" is a term with a variety of meanings. Actually, it is a commonly used word with a generally understood meaning and in the context of the "Assignment of Earnings" (Exhibit P-9), it has a clear and concise meaning. In this case, it clearly means the profit, as contrasted to the gross income or gross proceeds from the contract.

Black's Law Dictionary defines "earnings" as "The gains of the person derived from his services or labor *without the aid of capital.* (Emphasis added).

Without the aid of capital, means the cost of labor or material or the capital contribution that a person must put into a job to earn a return. This intent is clearly evident from most of the decisions which have attempted to define the term and this meaning is only lost in those cases where the Court is attempting to construe statutory definitions of the term or the meaning of the term under specific statutory usage.

For example, Plaintiff, in his brief, refers to the case of Springville Coal Mining Co., Plaintiff in err. vs. State Industrial Commission, et al, Defendants, 126 N.E. 133, 22 ALR 859, for the statement that "earnings are either gross or net earnings." This case does not stand for that proposition, but this was a situation involving the construction of the Workmen's Compensation Statute of Illinois and whether the

term "earnings" meant gross pay before the usual deductions. Obviously, this type of situation does not involve the common usage of the word; particularly, a sub-contract requiring the furnishing of labor and materials to a construction job. We have not found any cases (including those cited by the Plaintiff) that hold that the term includes an ambiguous concept of both "net earnings" and "gross earnings".

A good example of the type of usage that we are referring to is found in the Montana case of Dayton vs. Ewart, 72 P. 420 (1903). In this case, the Appellant had attached certain gold dust that had been mined by the Respondent and sold in satisfaction of a judgment. The Respondent claimed that the gold dust was exempt from execution under a statute which provided that there should be exempt from execution "the earnings of the judgment debtor for his personal services rendered. . . . " The Court said:

> "Between the terms 'wages' and 'salary' there is no material difference when they are applied to the subject here under consideration. The former term is commonly used to denote the compensation of laborers, and the latter that of other persons of more permanent employment and more elevated stations. The term 'earnings' is more comprehensive than either of the others. It implies, as do they, that the sum due shall be claimed for the personal services of the claimant, and that it shall not include, to any substantial extent, recompense for materials furnished; but earnings need not result from work done under the direction of another nor from manual labor."

The document the Court is asked to construe is entitled "Assignment of Earnings". The first paragraph says: (Exhibit P-9)

> "I, Lynn Gawan agree to assign all my earnings on a 30,482.00 contract, between myself and Bettilyon Construction Company job #E 1262 dated 28 Sept. 1962, to the Hudson Investment Company (313 East 9th South) to secure a note on myself by Hudson Investment Company".

The only logical meaning that can be given to the term "earnings", under these circumstances, is the definition given by the case cited above. Mr. B. Lue Bettilyon, testified that the profit on this job would amount to approximately 20% to 25% (T 34-35). Mr. Lynn Gawan had submitted a bid and certainly knew the cost of the labor and materials that were to go into the construction of the roof. He also knew that under his contract and the general contract, that labor and materials would have to be paid before he could expect to receive his final settlement. Only by a wild stretch of the imagination is it possible to torture the meaning of the word "earnings" to include the cost and expense of labor and materials.

One of the basic rules of construction is that "plain unequivocal terms or in terms susceptible of interpretation and construction under recognized rules of law are bound by the meaning of the contract which is reached by a proper interpretation". 17 Am Jur (2d), 358 (Contracts, Paragraph 21). The word "earnings" has only one meaning as used in this document.

The third paragraph of the Assignment of Earnings (Exhibit P-9) has some interesting language. It says:

> "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. The above assignment is agreeable to Bettilyon Construction Company".

The sub-contract agreement, Paragraph 13, Indemnification, states:

> "The SUBCONTRACTOR agrees to satisfy immediately any lien or encumbrance filed against the premises arising by reason of work performed pursuant to this Subcontract, or any work sublet by the said SUBCONTRACTOR, 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 or nature, including attorney fees, arising out of, in connection with, or incident to the Agreement."

Under this sub-contract, where a lien is filed prior to the final payment, the general contractor had the right to settle the claim and discharge the lien and it took all of the funds due on the sub-contract to settle the lien, then there were no "*payments due*" under the contract. That is the situation in this case.

Plaintiff has argued vaguely, that Paragraph 13, since it is on the reverse side of the document, does not

form a part of the sub-contract. However, Paragraph 1 entitled "The Contract Documents", has this provision in bold face print "THE PROVISIONS PRINTED ON THE REVERSE SIDE HEREOF ARE REFERRED TO AND MADE A PART OF THIS AGREEMENT". Clearly, there is no question that the terms and conditions on the reverse side of the document can be incorporated into the agreement itself, if that is clearly the intent of the parties. In addition, the last line of the bottom of the first page of this sub-contract agreement states: "Provisions printed on reverse side hereof are part of this Agreement and binding upon the parties hereto)". There certainly could be no question that the parties intended to bind themselves to the provisions on the reverse side of the document.

The Plaintiff states that the Assignment (Exhibit P-9) was probably prepared by Lynn Gawan. However, Mr. Fred Hudson testified as follows: (T-63)

> Q Mr. Hudson, I presume this assignment, all except for the second paragraph, was prepared in your office, was it not?
> A I don't know definitely, Mr. Bettilyon, but I was under the impression it was, but don't know definitely."

This document certainly was not prepared by the Defendant, since when the document was presented to Mr. B. Lue Bettilyon, he added the second paragraph and the two other paragraphs are obviously typed on a different typewriter. The authorship of this docu-

ment must be credited to the Plaintiff and Plaintiff is not able to pass it off as a product of Mr. Lynn Gawan. Plaintiff relied upon this document; he required it as a condition of the loan that he made to Lynn Gawan and, therefore, in accordance with the rules of construction, it must be construed against the person preparing the document. Thus rule is cited in 17 Am Jur (2d) 689 (Contracts, Paragraph 276):

> "It is fundamental that doubtful language in a contract should be interpreted most strongly against the party who has selected that language, especially where he seeks to use such language to defeat the contract or its operation, unless the use of such language in the contract is prescribed by law. Also, in case of doubt or ambiguity a contract will be construed most strongly against the party who drew or prepared it, or whose attorney drew or prepared it. Another form in which substantially the same rule is stated is that where doubt exists as to the construction of an instrument prepared by one party thereto or his attorney, upon the faith of which the other has incurred an obligation, that construction will be adopted which will be favorable to the latter." (See, also, Handley vs. Mutual Life Insurance Company of New York, 106 Utah 184, 147 P. (2d), 319, 152 ALR, 1278).

POINT 2.

POINT 2. THERE WAS NO SEPARATE, VALID OR ENFORCEABLE CONTRACT THAT CAME INTO BEING BETWEEN

PLAINTIFF AND DEFENDANT, IN THIS ACTION.

The Plaintiff has set out, in his Brief, under Point 2, the requirements for an enforceable contract, including a consideration. In this case, the Plaintiff has not alleged nor was any evidence, whatsoever, introduced as to the nature of the consideration for the so-called contract, between Hudson Investment Company and Bettilyon Construction Company. In fact, this was not even argued in the trial of the case in the District Court; this is new matter on this appeal.

17 Am Jur (2d) 427 (Contracts, Paragraph 85), defines consideration as follows:

> "Technically, consideration is defined as some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. Again, consideration for a promise is defined as an act or a forbearance; or the creation, modification, or destruction of a legal relation; or a return promise bargained for and given in exchange for the promise. Consideration is, in effect, the price bargained for and paid for a promise—that is, something given in exchange for the promise."

Defendant has received no "right, interest, profit, or benefit", nor has the Plaintiff given up anything of value to the Defendant. Interestingly, the Plaintiff does not even suggest, in his Brief, of what the consideration consisted. Paragraph 86 on Contracts, in the same volume, states as follows:

> "It is well settled, as a general rule, that consideration is an essential element of, and is necessary to the enforceability or validity of, a contract. It follows from this rule that a promise not supported by any consideration cannot amount to a contract or be enforced, and that want or lack of consideration is an excuse for nonperformances of a promise. In order for a contract to be valid and binding, each party must be bound to give some legal consideration to the other by conferring a benefit upon him or suffering a legal detriment at his request".

Since there was no consideration, it cannot now be claimed that Plaintiff and Defendant entered into a contract.

POINT 3.

POINT 3. PLAINTIFF WAS PAID.

The Lower Court, in its Memorandum Decision, in Paragraph 2, made the following finding:

> "The Court finds that the Plaintiff was paid."

The Plaintiff states, in his Brief, that it is difficult for him to understand on what basis this finding was made, but the Plaintiff admits that he received a check in the amount of $15,300.00 (Exhibit D-2), and that he endorsed this check. What he did with the funds from this check is immaterial in this lawsuit. In defining the term "payment", the Oklahoma Supreme Court, in the case of Hill vs. Henry, 124 P. (2d) 405, page 408, says, " . . . the term 'payment' . . . denotes de-

livery to the obligee (or creditor), in satisfaction of the claim or demand". In this case, a check for $15,-300.00 was delivered to the Plaintiff. He endorsed it and he accepted it. The Defendant was entitled to rely upon delivery of the check and the cashing of the same by the Plaintiff, or anyone else to whom he delivered the check, after proper endorsement, as payment and as satisfaction of the claim. It is true that under these circumstances, such payment might have been received, but not intended by any of the parties as payment of the obligation, but if this were the case, then it would be mandatory upon the creditor to give clear and immediate notice to the assignee, that such payment was not accepted as payment in full. In this case, the Plaintiff stated, at the end of the case, after all of the evidence was in, that he telephoned Mr. B. Lue Bettilyon concerning the $15,300.00 check (T-65), but only inquired as to whether there was another payment due. This conversation was denied by Mr. B. Lue Bettilyon (T-66). The Plaintiff, on cross-examination, in response to questioning concerning this check, testified (T- 39-40):

> "Q Did you discuss with Mr. Gawan the nature of this job?
>
> A He told me it was a roofing job, Sir.
>
> Q Did you ask him how much of the job would be materials and labor?
>
> A No, sir.
>
> Q But you realize that a great part of it would be materials and labor?

A Yes, sir; a certain part of it, certainly. How much, I don't know.

Q Did he tell you that he was borrowing the money to pay for the materials?

A No, sir.

Q Why didn't you take any money out of the first check that was given to him?

A Mr. Gawan said he was short on cash at that time, and there was considerable left, and the remainder of the payment would come due before the note was due.

Q But you didn't bother to inquire about whether or not he paid material and labor bills on the job?

A No, sir; I didn't.

Q You didn't bother to inquire as to whether—what the extent of those bills would be and how much would have to come out of the final check?

A No, sir; I didn't.

Q The assignment said, "I, Lynn Gawan, agree to assign to you all money earned on a $30,482.00 contract," and you never at any time asked him how much the earnings of the job were going to be?

A I didn't feel I had to do so because Bettilyon Construction, with the acknowledgment, agreed to pay all payments on the job to me and the total amount of payments was over $30,000.00".

Mr. B. Lue Bettilyon testified concerning this matter as follows T-34):

"Q Now at the time that the check, Exhibit—
THE COURT: D-2

Q (By Mr. Bettilyon) D-2 was delivered, did you ever receive any telephone call or inquiry from Hudson Investment Company relative to that?

A No, I did not.

Q Did Hudson Investment Company at any time notify you that they had not received all of the proceeds of that check?

A No. As a matter of fact, I assumed that they had.

Q Would you have been able to help them if they had called you?

A If they had called me prior to them endorsing the check, yes.

Q What would you have told them?

A I would have immediately investigated with General Builders Supply to find out if these material bills had been paid.

Q But you never received any call or notice?

A None whatever. The first notice I had of any problem was when General Builders Supply called about sometime late in December and there was quite an unpaid bill on the job."

Surely, the Plaintiff, under these circumstances, had a duty and an obligation to put the contractor on notice that he was not being paid out of the $15,300.00 check, and any risk that the Plaintiff took by not obtaining his money when he had opportunity, must be assumed by him and cannot now be passed onto an innocent third party, the Defendant in this case.

POINT 4.

POINT 4. THE PLAINTIFF'S RECOVERY IS BARRED BY RULE 13(j) OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 13(j) of the Utah Rules of Civil Procedure provides as follows:

> "Except as otherwise provided by law as to negotiable instruments and assignments of accounts receivable, any claim, counterclaim, or cross-claim which could have been asserted against an assignor at the time of or before notice of such assignment, may be asserted against his assignee, to the extent that such claim, counterclaim, or cross-claim does not exceed recovery upon the claim of the assignee."

Plaintiff argues that the words "at the time of or before notice of such assignment" removes this rule from having effect in this factual situation because the assignment to the Plaintiff occurred sometime in October, 1963, and the materials were furnished during the dates of November 12, 1962, to December 26, 1962. Plaintiff, therefore, argues that the right of the materialman and the right of the Defendant to offset did not arise until November 12, 1962. There are several reasons why this reasoning is faulty:

(a) The rights of Bettilyon Construction Company against Lynn Gawan arose at least with the execution of the sub-contract on September 28, 1962, and probably, even before this, as is pointed out below. An assignee of a non-negotiable claim cannot

stand in any better position than does his assignor. The assignee must take subject to all defenses or equities that could have been asserted or may at any time in the future be asserted against the assignor. This rule is stated in 6 Am. Jur. (2d), 282 (Paragraph 102, Assignments):

> " . . . the general rule is that an assignee of a non-negotiable chose in action acquires no greater right than was possessed by his assignor, and simply stands in the shoes of the latter.
>
> In an action on the claim assigned, the assignee is ordinarily subject to any setoff or counterclaim available to the obligor against the assignor and to all other defenses and equities which could have been asserted against the chose in the hands of the assignor at the time of the assignment."

Mr. Hudson acknowledged on direct examination by his counsel that he saw the subcontract agreement (Exhibit D-4) prior to the time that he loaned the money to Gawan (T-29-30). He knew that the right of Mr. Gawan to receive any money was dependent upon his performance under the contract and his compliance with all of the terms and conditions of the contract. He could not, at any time, acquire any greater rights than Mr. Gawan had in the contract.

(b) The rights of a materialman do not date from the time of furnishing labor or materials, but the lien "shall relate back to, and take effect of, the time of the commencement to do work or furnish materials on the ground for the structure or improve-

ment and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building improvement or structure was commenced, work begun or first material furnished on the ground . . . ," 38-1-5, Utah Code Annotated, 1953. Therefore, any assignment by a subcontractor would be subject to the prior claim of materialmen who furnished materials at the request of the subcontractor even though the materials were furnished after the assignment.

(c) Another reason why Plaintiff's reasoning must fail is that under the provisions of 14-2-2, Utah Code Annotated, 1953, the owner of the property must require a bond from the general contractor and the general contractor from his subcontractors, or the owner of the property is directly liable to the materialmen or laborers who do work or furnish materials for the job, even though there is no direct contractual relationship between the owner and such materialmen or laborers. Therefore, under the general contract, the owner has a right of offset against the general contractor for payment of any liens that may be filed against the job, and the general contractor has the right of offset against the subcontractors for any liens that have not been paid, or as in this case, the general contractor has a right to pay the lien directly and discharge the same, and deduct the same out of the proceeds due the subcontractor.

In this case, the rights of setoff against Lynn Gawan, d/b/a Structural Components Company, prob-

ably dates back to the date of the original general contract between the owner of the property and the general contractor, Bettilyon Construction Company, because the subcontract agreement between Bettilyon and Gawan incorporates the general contract by reference in Paragraph 1 thereof (Exhibit D-4). In any event, the date of setoff certainly begins as of September 28, 1962, the date of the subcontract. Rule 13(j) of the Utah Rules of Civil Procedure therefore applies in this case.

There is one other matter that we add to this Brief, perhaps immaterial, but we feel quite significant. The Plaintiff does not come into Court, in this matter, with clean hands. The note (Exhibit P-1) which he is attempting to collect was, supposedly, purchased from one, Alden Gibbs, for a discount of between $750.00 to $1200.00 (T-36). Yet, surprisingly, Mr. Hudson has never met Alden Gibbs, nor had any business dealings with him (except for a telephone call) and, even more surprising, is the fact that the promissory note which, supposedly, was prepared for Alden Gibbs, contains the provision "this note and interest thereon is secured by assignment of earnings on a $30,482.00 contract between Structural Components Company and Bettilyon Construction Company. When Mr. Gawan went in to borrow money in the first place, he was informed that it would have to be done by discounting a note (T-42). Mr. Gawan says the note was prepared in the office of Hudson Investment Company (T-42), and then taken to Mr. Alden Gibbs for endorsement.

There was an assignment already on the note but it was crossed out and Mr. Gawan testified (T-43) that the present endorsement was placed on the note by Mr. Gibbs. Mr. Hudson denied that the note had been typed in his office. Mr. Hudson, also, does not recall whether or not the check for the money that he paid for the note had the name of "Alden Gibbs" on it or not. Yet, he was purchasing the note from Mr. Gibbs — not making a direct loan to Lynn Gawan. All of this, while, perhaps, immaterial to the main issues in this case, simply indicates that this note was, obviously, a device for charging a higher rate of interest than is allowed by law. By using the apparent subterfuge of purchasing a note at discount, Mr. Hudson for $2500.00, more or less, expected to receive a return of $3,750.00, between October 25, 1962, and December 29, 1962, a very nice return indeed. Now, with his hands so obviously dirty in this transaction, Mr. Hudson would ask that the Ciurt enforce this usurious document and make the Defendant, who has acted in good faith on this matter from the beginning, pay a sum of money twice— once to the person who is entitled to receive it (General Builders Supply Company) and, secondly, to the Plaintiff in this action, who is, obviously, not entitled to receive it.

CONCLUSION

We conclude by referring to the Memorandum Decision of Judge Stewart M. Hanson below (R-16A)

1. The Assignment was an Assignment of Earnings only and not of the entire proceeds of the contract.

2. The Plaintiff was paid when he received and accepted a check for $15,300.00.

3. The Defendant is entitled to the benefit of Rule 13(j) of the Rules of Civil Procedure and was entitled to offset any sums due for materials that had not been paid by Lynn Gawan.

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Respectfully submitted,

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Mailed two copies of the foregoing Brief to John Elwood Dennett, Attorney for Plaintiff and Appellant, 1243 East 2100 South, Salt Lake City, Utah, this 9th day of August, 1965.
