1992

F.M. Electric Company v. Ralph L. Wadsworth Construction : Reply Brief

Utah Court of Appeals

Ronald C. Barker; Stanford P. Fitts; Beesley, Fairclough, Cannon & Fitts; Counsel for Appellees.
Robert F. Babcock; Jeffery R. Price; Walstad & Babcock; Counsel for Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

Docket No. 920781-CA
Priority No. 15

F.M. ELECTRIC COMPANY,

Plaintiff and Appellant,

vs.

RALPH L. WADSWORTH CONSTRUCTION COMPANY, McNEIL CONSTRUCTION COMPANY, and AMERICAN CASUALTY OF READING, PA.,

Defendants and Appellees.

REPLY BRIEF OF APPELLANT

Appeal From a Summary Judgment of the Fourth Circuit Court, in and for Box Elder County, State of Utah, Civil Action No. 92000052 CV, Honorable Robert W. Daines, Circuit Judge

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Argument

The only issue before this Court for review on Appeal is whether, as a matter of law, the "pay when paid" provision of the subcontract constitutes a condition precedent to final payment, or merely a timing mechanism relating to an absolute promise to pay. F.M. Electric argues that as a matter of the prevailing law, the provision of the subcontract at issue must be interpreted as merely a timing mechanism, the failure of which makes payment due within a reasonable time. In defense, appellees argue that the provision constitutes, as a matter of law, a condition precedent to its obligation to make final payment under the subcontract. The resolution of these conflicting arguments is no more complicated than for this Court to make a legal judgment as to which argument must prevail under the undisputed material facts.

Appellees' reliance on U.C.A. §§15-6-5, and 58-55-16 demonstrates only Wadsworth's shameful misunderstanding of the issue of law presented in this case, as explained at pages 16 through 18 of Appellant's initial Brief.

Also as explained in Appellant's initial Brief, Appellees' reliance on Zorn v. Sweet, 77 Utah 389, 296 P.2d 242 (1931); Johnson v. Geddes, 49 Utah 137, 161 P. 910 (1916). In Zorn, Hood v. Gordy Homes, Inc., 267 F.2d 882 (4th Cir. 1959), Smith v. Boyden, 49 Idaho 638, 290 P.377 (1959); A.A. Conte v. Campbell-Lowrie-Lautermilch, 477 N.E.2d 30 (Ill. App. 1985), Brimmer v. Union Oil Co. of Ca., 81 F.2d 437 (10th Cir. 1936), and Ephraim Theater Co. v. Hawk, 321 P.2d 221 (Utah 1958) is in error insomuch

as those cases are not truly relevant, and certainly not dispositive of the issue presented in the present case in this appeal.

Appellees' argument that the authorities relied upon by F.M. to support its position in this case are inapplicable is simply specious and disingenuous and intentionally ignores the only issue before the Court on appeal.

Appellees' argument that F.M. has waived any objection to the Affidavits of Mr. Wadsworth is similarly flawed. As discussed in F.M.'s initial brief, the Affidavit of Kip Wadsworth relating to the intention of the parties is simply parole evidence which should not have been considered by the court below. But in any event, the Affidavits are simply self-serving statements made after the fact of the formation of the subcontract which are neither reliable as evidence in light of the language of the subcontract, the best evidence of the parties' agreement, nor are the averments of the Affidavits in any way dispositive of the issue presented for review in this case.

Finally, Rule 11 of the Utah Rules of Civil Procedure do not provide a remedy or sanction for the payment of attorneys fees and costs under the circumstances of this case. There is simply no evidence or any other indication that the lawsuit filed and pursued by F.M. is frivolous and is otherwise not well grounded in fact or law, or brought for the purpose of changing, modifying or, in this case, establishing law. The fact that the trial judge found the contentions without merit does not make the case frivolous or of

the stuff Rule 11 sanctions are made of. Thus, the award of fees must be reversed.

CONCLUSION

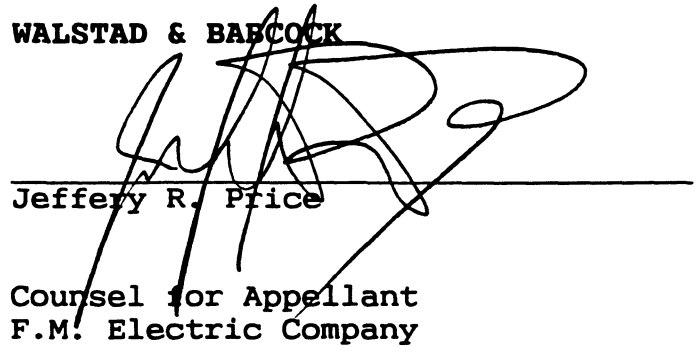
Appellees in this case have sought throughout to avoid the central issue presented for determination for the first time this Court, or any other Utah Appellate Court. However, there is a well-established majority rule which has the force of prevailing law, which the Appellant urges this Court to Adopt as the law of the State of Utah, and which compels a determination that the judgment of the Court below must be reversed. The prevailing, majority rule of law regarding the interpretation of "pay when paid" clauses in construction subcontracts demands that the clause at issue in the present case be interpreted as creating a mere timing mechanism for the convenience of the parties, and as requiring that final payment be made by Wadsworth/McNeil within a reasonable time following satisfactory completion of the subcontract work by F.M. Electric. This is particularly true where F.M. Electric was not the cause of, nor had any control over, the delay in payment from UDOT to Wadsworth/McNeil. It would simply be unjust to hold F.M. Electric responsible for payment from UDOT to Wadsworth/McNeil.

Accordingly, F.M. Electric seeks on this appeal (1) a determination that the subject provisions do not constitute a condition precedent to payment for satisfactorily completed work; (2) an order of the Court of Appeals reversing the decision of the court below and ordering that judgment be entered in favor of F.M.

Electric and against appellees; and (3) and an order of the Court of Appeals requiring appellees to pay all of F.M. Electric's attorney's fees and costs incurred in this Court and in the court below.

DATED 28th day of May, 1993.

WALSTAD & BABCOCK



Jeffery R. Price

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PROOF OF SERVICE BY MAIL

I, Jeffery R. Price, hereby certify that on this 28th day of May, 1993, I caused to be served two (2) true and correct copies of the foregoing Reply Brief of Appellant upon each of counsel for defendants by placing same in the United States Mail, first class postage pre-paid and correctly addressed to their respective mailing addresses as follows:

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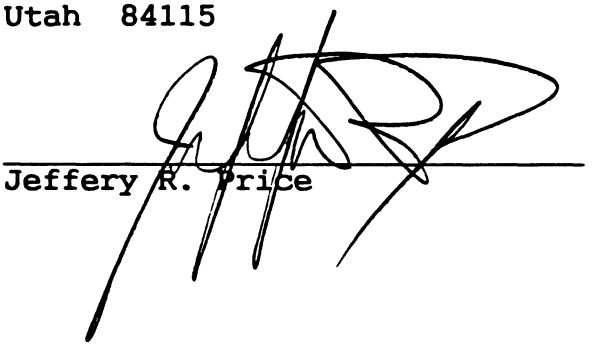

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