1992

# Garth Leavitt and Bob Allen v. Glendon Corporation, a Utah Corporation : Petition for Rehearing

Utah Court of Appeals


James T. Dunn; Anderson and Dunn; Attorney for the Appellees.
Ronald E. Griffin; Attorney for Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

NO. 920828 CA

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| GARTH LEAVITT and BOB ALLEN,<br><br>Plaintiffs/Appellees,<br><br>v.<br><br>GLENDON CORPORATION, A Utah Corporation,<br><br>Defendant/Appellant. | ) | Priority No. 15<br><br>Appellate Court No. 92-0828-CA |

**PETITION FOR REHEARING**

**BY GLENDON CORPORATION**

Appeal from Judgment Entered in the Second Circuit Court, State of Utah
Davis County, Bountiful Department, Honorable S. Mark Johnson, Presiding

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IN THE COURT OF APPEALS OF THE

STATE OF UTAH

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| GARTH LEAVITT and BOB ALLEN, | ) | |
| Plaintiffs/Appellees, | ) | |
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## PETITION FOR REHEARING

Defendant/Appellant Glendon Corporation (hereinafter "Glendon"), pursuant to Rule 35, Utah R. App. P., petitions the court for rehearing of the decision filed September 27, 1994 in the above-referenced matter on the grounds that a majority of the court overlooked or misapprehended the following points of law or fact:

1. The fundamental issue in this case was: How much money, if any, did Glendon owe Bob Allen and Garth Leavitt (hereinafter "Allen & Leavitt") under the terms of the parties' subcontract? There was insufficient evidence, as a matter of law, to support the trial court's finding that Glendon owed Allen & Leavitt the sum of $7,215.00.

2. Even if the parties' subcontract was ambiguous regarding backfill, the trial court failed to apply the unambiguous set-off (or recoupment) and damages provisions in the subcontract to reduce the amount Glendon owed Allen & Leavitt.

## ARGUMENT

### A. THERE WAS INSUFFICIENT EVIDENCE, AS A MATTER OF LAW, TO SUPPORT THE AMOUNT OF JUDGMENT

There is no dispute that the parties entered into the written subcontract identified as plaintiff's exhibit, hereinafter "PEx." 2 and attached as addendum "B" to Appellant's principal brief ("APB"). (Defendant's exhibit, hereinafter "DEx." 1, Transcript on appeal, hereinafter "Tr." 30-31, 55). The parties' subcontract incorporated the project Plans and Specifications. (PEx. 2)

The trial court concluded there was an ambiguity in the subcontract as to whether Allen & Leavitt were obligated to provide backfill material. (APB addendum G) Apparently a majority of this court agreed. Appellant contends, however, that the plans and specifications (as incorporated into the subcontract) unambiguously required Allen & Leavitt to do excavation work, including "all labor necessary to produce the construction required by the Contract Documents and all materials and equipment incorporated or to be incorporated in such construction". (DEx. 4) Appellant urges the court to carefully reconsider whether the subcontract was ambiguous.

Even if we assume for the sake of argument that the subcontract was ambiguous, and that, despite no finding by the trial court, the parties intended for Glendon to supply the backfill, the evidence at trial was still insufficient, as a matter of law, to support the amount of judgment. Allen & Leavitt's complaint alleged breach of contract and claimed damages of $7,715.00. At trial, the only evidence offered to support this damages claim was a billing statement, a copy of which is attached hereto as addendum 1. (See also APB addendum C, PEx. 1)

Glendon requested the billing statement to support in writing Allen & Leavitt's draw request. The billing statement was based on hours worked multiplied by an hourly rate for the type of machinery used. (Tr. 36, 122, PEx. 1). On cross-examination, Allen & Leavitt admitted their subcontract with Glendon was for a fixed sum. They also acknowledged that the billing statement should have been calculated based on percentage of job completed. (Tr. 36-37, 54). Paragraph 21 of the parties' subcontract contemplated payment based on

percentage of job completed. No evidence at trial supported a damage award based on hours worked. Yet, the trial court premised its award on Allen & Leavitt's billing statement.

This court should not affirm a damage award calculated from a formula that has no relationship to the parties' agreement and the facts of this case.

## B. THE TRIAL COURT FAILED TO APPLY UNAMBIGUOUS SETOFF AND DAMAGES PROVISIONS IN THE SUBCONTRACT

Allen & Leavitt demanded payment of $6,000.00 from Glendon. (Tr. 53). Lefler questioned the amount and asked them to support it in writing. (Tr. 54). Allen said he submitted PEx. 1 (Addendum 1 hereto) "right after that". When Glendon did not immediately pay the draw, Allen & Leavitt walked off the job. (Tr. 29, 103).

Allen & Leavitt did not have a contractual right to immediate payment of the draw. Due to time constraints, this point was not raised at oral argument, however, it justifies appellant's exercise of its setoff rights under the terms of the parties' subcontract.

Glendon's policy was to pay a draw submitted by the 25th of the month on the 25th of the following month. (TR. 118-119). This policy is reflected on the obverse of the parties' subcontract under the headings "Terms". Paragraph 21 of the subcontract required Allen & Leavitt to wait for payment until Glendon received payment from the owner, Farmington City. On this project, Farmington City actually prepared separate checks payable to individual subcontractors and delivered them to Glendon for disbursement. (Tr. 86, 118).

When Allen & Leavitt walked off the job they breached the parties' subcontract, which in turn gave Glendon the following contractual remedies:

> No. 9. SETOFF: All claims for money due or to become due from Buyer shall be subject to deduction or setoff by the Buyer by reason of any counterclaim arising out of this or any other transaction with Seller.
>
> No. 12. TERMINATION FOR CAUSE: Buyer may also terminate this order or any part thereof for cause in the event of any default by the Seller, or if the Seller fails to comply with any of the terms and conditions of this offer. Late deliveries, deliveries of products which are defective or which do not conform to this order, or failure to provide Buyer reasonable assurances of future performance, on request, shall each be a cause allowing Buyer to terminate this order for cause. In the event of termination for cause, Buyer shall not be liable to Seller for any amount, and Seller shall be liable to Buyer for any and all damages sustained by reason of the default which gave rise to the termination. . . .
>
> No. 28. To commence and at all times to carry on, perform and complete this subcontract to the full and complete satisfaction of the contractor, and of the architect or owner. It is specifically understood and agreed that in the event the contractor shall at any time be of the opinion that the subcontractor is not proceeding with diligence and in such a manner as to satisfactorily complete said work within the required time, then and in that event the contractor shall have the right, after reasonable notice, to take over said work and to complete the same at the cost and expense of the subcontractor, without prejudice to the contractor's other rights or remedies for any loss or damage sustained.

Even if we assume for the sake of argument that Glendon was obligated to supply backfill, Glendon still incurred damages from Allen & Leavitt's breach which were subject to setoff (recoupment) under the subcontract. There was uncontroverted testimony at trial that Glendon employees Steve Lefler and Ted Cromer spent 69 hours at $30.00 per hour for a total of $2,070.00 soliciting a replacement for Allen & Leavitt. Also, the trial judge said "the vast majority" of the $6,800.00 Glendon paid Farmington City was for transport of

backfill. (Tr. 136-37). He did not say all $6,800.00 was for backfill. Any amount of the $6,800.00 attributable to Allen & Leavitt's breach would be subject to setoff (recoupment).

The trial court deducted $500.00 from Allen & Leavitt's request for damages based on a change order that created less excavation work than originally bid. The court failed, however, to setoff Glendon's damages arising from Allen & Leavitt's breach.

> Where questions arise in the interpretation of an agreement, the first source of inquiry is within the document itself. It should be looked at in its entirety and in accordance with its purpose. All of its parts should be given effect insofar as that is possible. (emphasis added)

***Regional Sales Agency, Inc. v. Reichert***, 784 P.2d 1210, 1213, (Utah App. 1989) (quoting ***Big Cottonwood Tanner Ditch Co. v. Salt Lake City***, 740 P.2d 1357, 1359 (Utah App. 1987)); *See,* ***Buehner Block Co. v. UWC Associates***, 752 P.2d 892, 895 (Utah 1988).

Glendon relied on the terms in the subcontract for legal support and protection in its dealings with Allen & Leavitt. By ignoring Glendon's contractual right to setoff (recoupment) while using an alleged ambiguity to interpret the subcontract against Glendon's interests, the trial court has exhibited extreme prejudice and a cavalier disregard for basic contract law. Such judicial favoritism undermines the integrity of contracts and the confidence of contracting parties.

> . . . [A] court may not make a better contract for the parties than they have made for themselves; furthermore, a court may not enforce asserted rights not supported by the contract itself.. . . 'It cannot be adopted as a general precept of contract law that, whenever one party to a contract can show injury flowing from the exercise of a contract right by the other, a basis for relief will be somehow devised by the courts.'

*Ted R. Brown & Assoc. v. Carnes Corp.*, 753 P.2d 964, 970-71 (Utah App. 1988) (citations omitted). The unambiguous provisions in the subcontract should be applied to reduce the amount of judgment.

## CONCLUSION

For the reasons set forth above, Glendon respectfully requests that the court grant its petition for rehearing. Counsel for Glendon certifies that this petition is presented in good faith and not for delay.

DATED this _____ day of October, 1994.

Ronald E. Griffin
Attorney for Defendant/Appellant

## CERTIFICATE OF MAILING

I hereby certify that on the 11th day of October, 1994, I caused to be mailed two true and correct copies of the attached and foregoing PETITION FOR REHEARING BY GLENDON CORPORATION by United States Mail, postage prepaid, to the following:

James T. Dunn, Esq.
ANDERSON & DUNN
2089 East 7000 South, Suite 200
Salt Lake City, UT 84121

Addendum 1

451-2624

Grub Lot

| | | |
|---|---|---|
| Dratt | 20 hrs | 1500 |
| Dump | 20 | 600 |
| 580 | 16 hrs | 720 |
| | | 2820 |

Excavate Hole

| | | |
|---|---|---|
| Dratt | 24 hrs | 1800 |
| Dump | 16 hrs. | 480 |
| Dic Footings | 5 hrs | 375.00 |
| Truck Hauling Gravel / Rock | | 240.00 |
| | | 5715.00 |

Work on Contract yet to be done
Grade Parking Lot Haul 256 ton
Road Base - Bal 1285.00
Total Contract 9000.00
less City Credit 2000.00
Bal 7000.00

Extra To Place Rock. Drain line
Magic Paper #2000.00

#7715