1983

Geneva Pipe Company v. S & H Insurance Company v. John W. Maughan And Gladean Maughan : Brief of Appellant

IN THE SUPREME COURT OF UTAH, STATE OF UTAH

GENEVA PIPE COMPANY, a Utah Company, Plaintiff-Appellant, vs. S & H INSURANCE COMPANY, a California corporation, Defendant-Respondent. vs. JOHN W. MAUGHAN and GLADEAN MAUGHAN, Third-Party Defendants-Resondents.	Case No. 19273 ~~4476~~

BRIEF OF APPELLANT

APPEAL FROM THE SUMMARY JUDGMENT ENTERED IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

HONORABLE BOYD BUNNELL, JUDGE

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IN THE SUPREME COURT OF UTAH, STATE OF UTAH

[redacted] PIPE COMPANY, a Utah Company,	
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vs.	
S & H INSURANCE COMPANY, a California corporation,	
Defendant-Respondent.	
vs.	
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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Plaintiff brought suit to recover amounts owed for materials supplied and delivered to two construction projects of the City of Monticello, Utah. Defendant S & H Insurance Company, had previously issued material payment bonds to insure payment to persons supplying material or performing labor. Third-party defendant John W. Maughan d/b/a Jonco Construction Company was general contractor and has been adjudicated as bankrupt.

DISPOSITION IN THE LOWER COURT

Defendant S & H Insurance filed a Motion for Summary Judgment which was granted on May 17, 1983, the Honorable Boyd Bunnell presiding. A Motion to Reconsider Order Granting Summary Judgment was filed and denied.

RELIEF SOUGHT ON APPEAL

The Appellant seeks to have this Court reverse the lower court decision

granting Summary Judgment in favor of the respondent, and remand the case back to the lower court for disposition at trial, or in the alternative to reverse and remand with instructions to enter judgment in favor of plaintiff.

STATEMENT OF THE FACTS

In February, 1981, S & H Insurance Company, through its Utah agent, Leavitt Group-Bond Division, issued material payment bonds to insure payment to persons performing labor and supplying material on two construction projects with the City of Monticello, San Juan County, Utah, on which the general contractor was Jonco Construction Company, Inc. Payment Bond #BDB105113 was issued to cover the trunk sewer pipeline project, and Payment Bond #BDB105137 was issued to cover the outfall sewer and irrigation project. At the request of Jonco Construction Company, Geneva Pipe Company performed labor and supplied materials on the two construction projects, having a total value of $222,282.18.

In July, September and October, 1981, Geneva Pipe Company received from Jonco Construction Company, three payments totalling $105,000.00, which were applied to the City of Monticello projects, which were covered by the S & H Insurance Company materials payment bonds. In June, 1981, Geneva Pipe Company received a check in the amount of $45,000.00 from Jonco Construction Company, upon which there was no designation of a job or invoice and the check was applied on the general account of Jonco Construction Company. In November, 1981, Appellant received a check from Jonco Construction Company in the amount of $7,500.00 upon which there was no invoice or job name and the check was applied on the general account of Jonco Construction Company.

Geneva Pipe Company has stated in affidavits by its president that at no time before, or after, receipt of the $45,000.00 and $7,500.00 checks did Jonco Construction Company contact Geneva Pipe Company stating there had been a

misapplication of the checks. As a matter of fact, there were no instructions received by Geneva Pipe Company from Maughn, Jonco Construction Company or any of its agents or employees as to the application of the $45,000.00 and $7,500.00 checks.

Geneva Pipe Company's president also stated that beginning in 1975, Jonco Construction opened an account with Geneva Pipe Company. It had been the practice for a period of four years to make payments on the open account and thereby reduce the last balance. At no time during that first four years of business relationship did Mr. Maughn or Jonco Construction Company ever direct payment of checks to particular jobs or invoices. In 1979, Jonco Construction Company converted to a computerized billing/payment system. Bill payments were intermittently sent to Geneva Pipe Company. Some of these payments were for designated invoices or jobs, and others were left without any indication of an invoice or job name. From 1979 until Jonco Construction Company's termination of business, after filing bankruptcy, it was the practice of Geneva Pipe to make application of checks received without a job description or invoice number to the last balance on the general account. Jonco Construction Company had been aware, and had accepted this practice for over two years.

ARGUMENT

POINT I

DEFENDANT S & H INSURANCE COMPANY IS REQUIRED AS A MATTER OF LAW TO MAKE PAYMENT TO GENEVA PIPE COMPANY OF SUMS DUE GENEVA PIPE COMPANY FOR MATERIALS FURNISHED TO PROJECTS FOR WHICH THE DEFENDANT SURETY PROVIDED MATERIAL PAYMENT BONDS.

The law in Utah with respect to the issue involved in this case was first stated in the case of Salt Lake City v. O'Conner, et. al., 249 P.810

(Utah, 1926). In O'Conner, this court stated that a surety is not entitled to have payments made by the contractor to a materialman from proceeds of bonds received on account of the contract, applied on a particular indebtedness for which the surety is liable. In O'Conner it was proved that the contractor had paid to the materialman certain sums from funds derived from the proceeds of the bonds paid and delivered to the contractor on account of the contract in question, and that the payments received by the materialman were applied upon pre-existing debts arising out of a prior and independant transaction not secured by the bond involved in the action. The surety argued that it had an equity interest in the payment of funds on its bond obligation and that it had a right to have a specific application of those funds to the debt for which the surety was liable. The Court rejected the argument and allowed judgment to the plaintiff materialman against the bond.

In a later case, Utah State Building Commission v. Great American Indemnity Company, 140 P.2D 763 (Utah, 1943), the Utah State Building Commission brought an action for the benefit of Mountain States Supply Company against Frank Campion and a sub-contractor and the surety, Great American Indemnity Company. Campion was the general contractor on the Utah State Tuberculosis Sanitorium at Ogden, and furnished a bond issued by the Great American Indemnity Company conditioned to pay for all materials going into the sanitorium. The defendant Sargeant was a plumbing sub-contractor and ordered materials from Mountain States Supply Company. During the course of construction, Campion paid Sargeant, the sub-contractor, in full on Sargeant's contract. Sargeant had a general account with Mountain States Supply Company and purchased materials for other jobs on said account. Sargeant would designate certain payments to be applied only to the sanitorium job, but would also make

payments without a designation, which payments were credited to his general account. (It is interesting to note at this point that the facts of Great American Indemnity are on all fours with the facts of this case. That is, when Jonco Construction made designations on its checks as to the application of those funds, they were so applied, but when no such direction was included on the check, the check was applied on the general account.)

The surety, Great American Indemnity, took the position as the surety in the O'Conner case, that it had an equity interest in funds paid on the contract and that it was entitled to be credited for all funds generated on the contract and paid to suppliers and materialman. The court rejected the argument and made the following statements in its decision:

> We are convinced that the better reasons, as well as the preponderance of judicial opinion support the conclusions reached by the trial court. That is, that the materialman was at liberty to apply the money to the old debt...
>
> It is elementary law that: a creditor may apply a payment voluntarily made by a debtor, without any specific appropriation where there are two or more debts, to whichever debt he pleases...
>
> In view of the definite findings of the trial court that there was no direction as to how the payment in question should be applied, and that the supply company did not know the source of the money, Campion and his surety have no right to compel its application to the sanitorium account.

In the case of Standard Oil Company vs. Day, et. al., 161 Minn. 281, 201 N.W. 410, the Supreme Court of Minnesota held, in a case with facts very similar to the previously cited cases and this case that, even though the materialman knew that the money it received came from the original contractor, it could, pursuant to an understanding between the materialman and the sub-contractor, apply the money to the extinguishment of a prior unsecured debt on the ground that the monies so unconditionally paid to the sub-contractor became

its money, to use as its own, and that the surety had no equity in the money and no right to direct the applications of payments.

In the case of Davis County Board of Education v. Underwood, 349 P.2d 722, the Utah Supreme Court upheld a jury decision awarding judgment in favor of the plaintiff, a material supplier, against a contractor and a surety for value of material furnished by the plaintiff in the construction of a school wherein the surety contended that it was entitled to an offset of the amount that the contractor had paid the material supplier and that the supplier had applied upon a personal loan, rather than upon the material account.

Under Utah law, based upon the facts of this case, if the Court adopts the affidavit of Geneva Pipe Company, it would be entitled to judgment as prayed in its complaint, as a matter of Law. That is, Geneva Pipe Company, through its affidavit, states that it did not receive any kind of direction from Jonco Construction Company as to the application of the $45,000.00 of $7,500.00 checks received in June and November, 1981, respectively. The practice of Geneva Pipe Company was, and had been, to apply funds received in payment for jobs where the job was either designated or the invoice was designated, or to apply funds received without designation to the general account of Jonco Construction Company. Such was the practice in the cases herein cited, and this Court upheld rulings of the trial court or jury awarding judgment to the plaintiffs. Thus, based upon the affidavit of Geneva Pipe Company and the facts of this case, Geneva Pipe Company is entitled to judgment as a matter of law. Under the Minnesota case, Geneva Pipe Company is entitled to judgment as a matter of law, regardless of whether it knew the source of the monies paid to it or had been instructed as to the application of those funds.

POINT II

THE PROVISIONS OF SECTION 58A-1-19 UTAH CODE ANNOTATED 1953 AS AMENDED, PREVIOUSLY 58-23-14.5 UTAH CODE ANNOTATED DO NOT HAVE APPLICATION TO THIS CASE.

This Court decided the case of Western Ready Mix Concrete Company v. Rodriguez, 567 P.2d 1118 (Utah, 1977), which case cites Section 58-23-14.5 Utah Code Annotated, now 58A-1-19, Utah Code Annotated. The statute as construed by this Court is distinguishable and is not available to S & H Insurance Company as a defense to the claims of Geneva Pipe Company.

Section 58A-1-19, Utah Code Annotated, states the following:

> Any owner or contractor in making any payment to a materialman, contractor, or subcontractor with whom he has a running account, or with whom he has more than one contract, or to whom he is otherwise indebted, shall designate the contract under which the payment is made or the items of account to which it is to be applied. When a payment for materials or labor is made to a sub-contractor, or materialman, such sub-contractor or materialman shall demand of the person making such payment, a designation of the account and the items of accounts to which the payment is to apply. In any case where a lien is claimed for materials furnished or labor performed by a sub-contractor or materialman, it shall be a defense to the claim that a payment made, by the owner to the contractor for the materials has been so designated, and paid over to the sub-contractor or materialman, and that when the payment was received by the sub-contractor or materialman, he did not demand a designation of the account, and of the items of account to which the payment was to be applied. (Emphasis added)

In the case of Western Ready Mix above cited, a Mr. Kelly engaged a Mr. Rodriguez as a contractor to make repairs to his home, in an amount in excess of $500.00, but did not require that a bond be furnished pursuant to Section 14-2-1, Utah Code Annotated. Thus, Mr. Kelly became personally liable to materialman for supplies furnished pursuant to the contract. Mr. Kelly paid Mr. Rodriguez and Mr. Rodriguiz paid Western Ready Mix Concrete for materials

supplied, however, Western Ready Mix Concrete credited the payment to a debt owing by Mr. Rodriguez for cement used on another job. Western Ready Mix thereafter sued Mr. Rodriguez and Mr. Kelly for payment of the concrete supplied to Mr. Kelly's home. The Supreme Court denied the claim of Western Ready Mix Concrete stating the following:

> When a contractor has an account with a materialman, which includes material furnished to jobs other than that of an owner who pays the contractor, the statute requires the materialman to make inquiry as to the job to be credited for any money paid by the contractor. And unless he does so, he loses his right to claim a second payment from the owner if he credits the money to some other person's account.
>
> The statute set out above was enacted to prevent the very thing that is involved in the instant case. It is a defense against the provisions of the old law (Section 14-2-1, Utah Code Annotated) and prevents a miscarriage of justice. (Emphasis added)

It should be noted that the Utah Supreme Court made direct reference by footnote to Section 14-2 in its holding that the provisions of Section 58A-1-19 constituted a "defense against the provisions of the old law." That is, the Supreme Court has held that an owner of property who fails to obtain a performance bond from a contractor as required by Section 14-2-1, can claim a defense under Section 58A-1-19. The Supreme Court did not apply the provisions of Section 58A-1-19 to Section 63-56-38, Utah Code Annotated, which is the Section under which the bonds of S & H Insurance Company in this case were required to be obtained.

Produced hereafter are the complete provisions of Section 63-56-38, Utah Code Annotated, the statute under which the defendant S & H Insurance Company was required to give bonds in this present case. This is done so that some important differentiations can be noted and distinguishing characteristics

pointed out.

Bonds necessary when contract is awarded. (1) When a construction contract is awarded, the following bonds of security shall be delivered to the state and shall become binding on the parties upon the execution of the contract:

(a) A performance bond satisfactory to the state, in an amount equal to 100% of the price specified in the contract, executed by a surety company authorized to do business in this state or any other form satisfactory to the state; and

(b) A payment bond satisfactory to the state, in an amount equal to 100% of the price specified in the contract, executed by a surety company authorized to do business in this state or any other form satisfactory to the state, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract.

(2) Rules and regulations may provide for waiver of the requirement of a performance or payment bond where a bond is deemed unnecessary for the protection of the state.

(3) Any person who has furnished labor or material to the contractor or subcontractor for the work provided in the contract, in respect of which a payment bond is furnished under this section, who has not been paid in full within 90 days from the date on which the last of the labor was performed or material was supplied by the person for whom the claim is made, shall have the right to sue on the payment bond for any amount unpaid at the time the suit is instituted and to prosecute the action for the amount due the person. However, any person having a contract with a subcontractor of the contractor, but no express or implied contract with the contractor furnishing the payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which the last of the labor was performed or material was supplied by the person for whom the claim is made. The person shall state in the notice the amount claimed and the name of the party for whom the labor was performed or to whom the material was supplied. The notice shall be served personally or by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts business.

(4) Any suit instituted upon a payment bond shall be brought in the district court of the county in which the construction contract was to be performed, but no suit shall be commenced later than one year from the date on which the last of the labor was performed or material was supplied by the person bringing the suit. The obligee named in the bond need not be joined as a party in the suit.

It is interesting to note that subparagraph (3) of Section 63-56-38,

Utah Code Annotated authorizes a direct action against the payment bond where a company furnishes the same. Nowhere in Section 63-56-38, Utah Code Annotated is there any reference to any defenses available to the person furnishing a bond that are similar to the provisions of 58A-1-19, Utah Code Annotated. The only limitations imposed by Section 63-56-38 are those with respect to any person having a contract with the subcontractor with no privity of contract with the original contractor and also the limitation of time in which a lawsuit must be filed.

It is further interesting to note that in the case of a governmental entity, a person supplying materials cannot file a mechanic's lien on the property (38-1-1, Utah Code Annotated), and all government construction contracts must be bonded with few exceptions as set forth in Section 63-56-38. On the other hand, private construction contracts are subject to the mechanic's lien laws set forth in Section 38-1 et. seq., Utah Code Annotated, and do not have the requirement of a bond. These distinguishing features are significant particularly when reference is made to the language of Section 58A-1-19, Utah Code Annotated. The language of the statute restricts the defense set forth therein to "any case where a lien is claimed for materials furnished or labor performed by a subcontractor or materialman...". Since it is impossible for a materialman or subcontractor to place a lien upon property involving a governmental construction contract or "public" contract as stated in Section 38-1-1, Utah Code Annotated, the defense which can be asserted against a lien claimant under the provisions of 58A-1-19 does not apply against a claim of a materialman or subcontractor furnishing materials or labor to a bonded public construction project. It would seem to be consistent with principles of fair play that since a supplier, materialman or subcontractor cannot file a lien on

... construction project and that all such projects are required to be bonded ... the protection of the owner that the claimant ought to be able to proceed directly against the bonding company without the defenses against his claim as set forth in Section 58A-1-19, Utah Code Annotated.

Finally, this Court in its interpretation of Section 58A-1-19, Utah Code Annotated, in the Western Ready Mix case dealt with a set of facts where there was no bond and where the owner was the subject of personal liability to the materialman or subcontractor. Obviously the decision of the Court was to interpret the statute as it should be interpreted as a protection for the owner and not for a bonding company. Interestingly enough, Section 58a-1-19 makes no reference to any protection for a bonding company but limits the protection to the owner who becomes personally liable to subcontractors and contractors for construction projects on his property if he fails to obtain a performance or payment bond. Thus, the provisions of 58A-1-19, Utah Code Annotated do not afford a shield of protection for the defendant S & H Insurance Company to hide behind, because S & H Insurance Company does not take the position of the owner in a public construction contract but is an insurer of faithful performance and payment of the obligations of the contract. To allow the defendant S & H Insurance Company to claim protection under Section 58A-1-19, Utah Code Annotated, in a situation involving a public construction project where a bond was required and where the plaintiff could not file a lien on the project property, would be an unwarranted and overly broad interpretation of both the statute and the Western Ready Mix decision of this Court. The protection of 58A-1-19 is a protection for an owner in a private construction project whereby inadvertance he may have failed to obtain a bond and became personally liable. Such is the only interpretation which has been given to the statute by this Court

in Western Ready Mix. To apply the provisions of Section 58A-1-19 to the fact situation before this Court in this case would be to impose a direct contradiction upon the provisions of Section 63-56-38, Utah Code Annotated, which specifically allows and authorizes a law suit directly against the bonding company in situations where a subcontractor or a materialman have not been paid by the contractor.

Thus, plaintiff contends that the provisions of Section 58A-1-19 do not provide a defense to a surety who is required to give a bond under Section 63-56-38, Utah Code Annotated, and that the defense provided under Section 58A-1-15, is available only to an owner who fails to obtain a bond under Section 14-2-1, which is the only conclusion this court reached in the Western Ready Mix case.

POINT III

SUMMARY JUDGMENT DOES NOT LIE UNLESS THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Rule 56(c) of the Utah Rules of Civil Procedure states that a summary judgment "shall be rendered forthwith if the pleadings, depositions, and answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This has been judicially interpreted by this Court to mean a "summary judgment is not a substitute for trial but is rather a judicial search for determining whether genuine issues exist as to material facts. Rule 56, Utah Rules of Civil Procedure, dictates the granting of summary judgment where there is no genuine issue of a material fact." Leininger v. Steams - Roger Manufacturing Company, 17 Utah 2d 37, 404 P.2d 33 (1965).

In effect, summary judgment is a judicial tool used to pare a dispute down to where only the actual controversy exists. Its purpose "is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail. Only when it so appears, is the Court justified in refusing such a party the opportunity of presenting his evidence and attempting to persuade the fact trier to his views. Conversely, if there is any dispute as to any issue, material to the settlement of the controversy, the summary judgment should not be granted." Holbrook Company v. Adams, P.2d 191, 193 (Utah, 1975).

POINT IV

A GENUINE ISSUE OF MATERIAL FACT WAS RAISED BY THE PLEADINGS AND AFFIDAVITS.

As previously set forth in this brief, the law in Utah is such that a creditor may apply a payment voluntarily made by a debtor without any specific appropriation, where there are two or more debts, to whichever debt he pleases...". Utah State Building Commission vs. Great American Indemnity Co., 105 Utah 11, 140 P.2d 763 (1943).

In this case, Jonco Construction Company made payments to Geneva Pipe Company for materials furnished. Jonco Construction Company had an open account with Geneva Pipe Company. The payments were sometimes directed to particular jobs or invoices and other times no designation was made. The controversy surrounds two payments that were not so designated, and according to long standing practice the payments were applied to the general account. Geneva Pipe Company claims that no subsequent designation was communicated by Jonco Construction Company. Jonco Construction Company claims that communication was made on how to apply the funds. The issue of whether or not the $45,000.00 and

$7,500.00 payments were directed to be applied on the Monticello job is very critical and vital to the determination of this case and said issue was not resolved by the pleadings or affidavits in the case. Plaintiff contends that Summary Judgment was improper.

CONCLUSION

This Court in the case of Utah State Building Commission vs. Great American Indemnity Co. decided the case with the facts identical to the facts of this case and held in favor of the plaintiff allowing the plaintiff to collect against the surety Great American Indemnity. Were this Court to follow the ruling in the Utah State Building Commission case, then plaintiff would be entitled to judgment as prayed in its complaint.

The case of Western Ready Mix Concrete Co. vs. Rodriguez is distinguishable from the case of Utah State Building Commission vs. Great American Indemnity Co. both on the facts and the law. Western Ready Mix involved a case of a mechanic's lien foreclosure under the mechanic's lien law on a private construction project. This case involves a law suit that by specific authority of Section 63-56-38, Utah Code Annotated, against the defendant surety on a public construction project. It is plaintiff's contention that the ruling in Western Ready Mix does not have application to the facts of this case.

The trial court wrongfully entered Summary Judgment against the plaintiff by failing to recognize an issue of material fact raised by the pleadings and the affidavits in the file. The trial court also improperly construed and interpreted the Western Ready Mix case. Thus, plaintiff contends that this Court should reverse the ruling of the trial court and enter judgment in favor of the plaintiff as prayed in its complaint or in the

alternative this Court should reverse the decision of the trial court and remand the case for trial of the issues of the case.

Respectfully submitted this 5th day of October, 1983.

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MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing brief of appellant to JOEL L. DANGERFIELD, Attorney for Defendant-Respondent at 340 East Fourth South, Salt Lake City, Utah 84111 and to GRANT M. PRISBREY, Attorney for Third-Party Defendants-Respondents at 2155 South Main, Salt Lake City, Utah 84111 this 6th day of October, 1983.