1983

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

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT S&H INSURANCE COMPANY

Appeal from a Judgment of the Seventh
Judicial District Court of San Juan County
Honorable Boyd Bunnell, Judge

Joel R. Dangerfield
Bryce E. Roe
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Respondent
S&H Insurance Company

Gary H. Weight
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
P.O. Box "L"
Provo, Utah 84603
Attorneys for Appellant

Grant M. Prisbrey
2155 South Main Street
Salt Lake City, Utah 84115
Attorney for Respondents Maughan

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT S&H INSURANCE COMPANY

Appeal from a Judgment of the Seventh
Judicial District Court of San Juan County
Honorable Boyd Bunnell, Judge

Joel R. Dangerfield
Bryce E. Roe
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Respondent
S&H Insurance Company

Gary H. Weight
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
P.O. Box "L"
Provo, Utah 84603
Attorneys for Appellant

Grant M. Prisbrey
2155 South Main Street
Salt Lake City, Utah 84115
Attorney for Respondents Maughan

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	
I DEFENDANT HAD A DUTY TO DEMAND A DESIGNATION OF THE ACCOUNT TO WHICH PAYMENTS BY JONCO CONSTRUCTION COMPANY SHOULD BE APPLIED, AND ITS FAILURE TO DEMAND THE DESIGNATION IS A DEFENSE TO ITS CLAIM AGAINST THE SURETY ON JONCO'S PAYMENT BOND	4
II BECAUSE OF THE PROVISIONS OF 58A-1-19 U.C.A. 1953, THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT	8
CONCLUSION	9

TABLE OF STATUTES, RULES, CASES AND AUTHORITIES CITED

STATUTES AND RULES CITED

	Page
41-2-1 Utah Code Annotated 1953	5, 9
68A-1-19 Utah Code Annotated 1953	5, 7, 8, 9
58-23-14.5 Utah Code Annotated 1953	5
63-56-38 Utah Code Annotated 1953	7

CASES CITED

Davis County Board of Education v. Underwood, 10 Utah2d 145, 349 P.2d 722 (1960)	4
King Bros., Inc. v. Utah Dry Kiln Co., 13 Utah2d 339, 374 P.2d 254 (1962)	6
Salt Lake City v. O'Connor, 68 Utah 233, 249 P. 810 (1926)	4
Utah State Building Commission v. Great American Indemnity Co., 105 Utah 11, 140 P.2d 763, 770-771 (1943)	4
Western Ready-Mix Concrete Company v. Rodriguez, 567 P.2d 1118 (Utah 1977)	5, 6, 9

COLLATERAL AUTHORITIES

2A Sutherland Statutory Construction (4th ed.) § 55.02, p. 380	7
2A Sutherland Statutory Construction (4th ed.) § 55.03, p. 383	7

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT S&H INSURANCE COMPANY

NATURE OF THE CASE

This is an action by a subcontractor on two municipal projects to recover from the surety on two payment bonds the sum of $117,250.40 claimed to be owing by the prime contractor. The subcontractor also sought interest at the rate of 18% and reasonable attorneys' fees.

DISPOSITION IN LOWER COURT

The court granted the surety's motion for summary judgment and entered judgment dismissing the action with prejudice, limiting the subcontractor's recovery to funds previously deposited in court by the surety, to-wit,

$77,992.16, and ordering that the funds be paid over to the subcontractor upon its ex parte motion. A motion for a release of the deposit was made and an order was entered by the court directing the treasurer of San Juan County to pay the sums to the order of the subcontractor.

RELIEF SOUGHT ON APPEAL

Respondent S&H Insurance Company seeks affirmance of the judgment of the trial court.

STATEMENT OF FACTS

The surety (respondent S&H Insurance Company) agrees with the appellant's statement of facts insofar as it describes the construction project the bonds, and the total value of the labor and materials supplied at the request of Jonco Construction Company. It agrees that $105,000 paid by Jonco Construction Company was applied by the subcontractor (appellant Geneva Pipe Company) as payment on the Monticello projects. And it agrees that the subcontractor received two checks, one in the amount of $45,000 and one in the amount of $7,500 from Jonco Construction Company which it applied on open accounts that had nothing to do with the Monticello projects.

Some additional facts are material. At the time the payments were made by Jonco, no demand was made by the subcontractor for a designation of the account and the items of accounts to which the payment was to apply (R. 74). In an affidavit supporting the motion for summary judgment John W. Maughan swore that when he learned that the funds had not been applied to the Monticello job, he notified the subcontractor that they should be so applied (R. 73), but the subcontractor states there is a dispute as to this matter, though the record on appeal does not contain a copy of the

affidavit of the subcontractor's president referred to in paragraph 3 of the statement of facts.

The $52,500 applied by the subcontractor to open accounts of Jonco Construction Company was from funds paid by the City of Monticello to Jonco for labor and materials furnished in connection with the two city projects (R. 73).

While the action was pending, the surety filed a motion for leave to deposit funds into court. This was based upon an analysis of the value of the labor and materials furnished as computed by the subcontractor, $222,250.40, less the $105,000 applied toward payment of the materials delivered to the Monticello Projects, leaving a balance of $117,250.40, less the $52,500 of Monticello funds that were applied by the subcontractor on open accounts, leaving a balance as of January 31, 1982, of $64,750.40. The surety then added interest through March 31, 1983, and tendered into court the sum of $77,992.16, as permitted by a court order signed on April 21, 1983. The computation of the amount tendered is set out in the attachment to the affidavit of Michael R. Vowles at R. 64. (The attachment shows $64,913.21 principal due to Geneva Pipe Company as of January 31, 1982, or $162.81 more than the figure as computed above, and inasmuch as the error is in the subcontractor's favor, this discrepancy should create no problem in connection with the summary judgment. In any event there has been no contention in the appellant's brief that this figure is incorrect if the surety is correct on the law.)

The deposit was made, and on June 6, 1983, after entry of the summary judgment, on motion of Geneva Pipe Company, the court ordered the treasurer of San Juan County to pay the funds to the company (R. 116,

117). On June 15, 1983, Geneva Pipe Company filed a notice of appeal with the district court.

ARGUMENT

I

DEFENDANT HAD A DUTY TO DEMAND A DESIGNATION OF THE ACCOUNT TO WHICH PAYMENTS BY JONCO CONSTRUCTION COMPANY SHOULD BE APPLIED, AND ITS FAILURE TO DEMAND THE DESIGNATION IS A DEFENSE TO ITS CLAIM AGAINST THE SURETY ON JONCO'S PAYMENT BOND.

The primary issue in this case is whether a subcontractor or materialman on a public construction project, upon receiving payment by the general contractor, may apply the payment as it chooses.

The early Utah case of Salt Lake City v. O'Connor, 68 Utah 233, 249 P 810 (1926), held that as against the surety on a payment bond, a materialman who had no knowledge of the source of funds paid to him, had a right to apply the payments as directed by the contractor. In Utah State Building Commission v. Great American Indemnity Co., 105 Utah 11, 140 P.2d 763, 770-771 (1943), the court held that as against a prime contractor and his surety, a materialman who had received payments from a subcontractor without any direction for application and without knowledge of the source of the funds, was free to apply the payment as it chose.

Davis County Board of Education v. Underwood, 10 Utah2d 145, 349 P.2d 722 (1960), upheld the right of a materialman to apply payments as it chose, where the jury found that the surety had failed to prove that the money applied had been received by the contractor for work done on the job to which the bond applied. The jury also found that there was no knowledge on the part of the materialman as to the source of the money.

The question before the trial court on defendant's motion for summary judgment, and before this court now, is whether, on the basis of the foregoing cases, the subcontractor was free to apply two payments as it chose, or whether it was required to apply them to the bonded projects of the City of Monticello. The subcontractor relied upon the cited cases, while the surety relied upon the provisions of 58A-1-19 Utah Code Annotated 1953 and Western Ready-Mix Concrete Company v. Rodriguez, 567 P.2d 1118 (Utah 1977). The statutory provision, 58A-1-19, reads as follows:

> 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 subcontractor, or materialman, such subcontractor or materialman shall demand of the person making such payment a designation of the account and the items of account to which the payment is to apply. In any case where a lien is claimed for materials furnished or labor performed by a subcontractor 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 subcontractor or materialman, and that when the payment was received by the subcontractor 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 Western Ready-Mix this court held that an identical prior statute, 58-23-14.5, precluded recovery by a materialman against an owner who had failed to provide a payment bond as required by 14-2-1 Utah Code Annoted 1953. The subcontractor in the present case takes the position that 58A-1-19 Utah Code Annotated 1953 operates in a very narrow field, and does not apply to cases other than those involving mechanic's liens or failures to obtain bonds as required by 14-2-1. Public contracts, and sureties on public contracts, it is argued, gain no benefit from the statute.

The underscored portion of the statute refers only to cases in which a lien is claimed for materials furnished or labor performed. It does not refer to public contracts or to bonds required for private contracts.

But the statute does more than refer to lien claims. The second sentence of the section requires subcontractors and materialmen, in any case in which any owner or contractor makes payment, to demand a designation of the account and the items of account to which the payment is to apply. Where the owner or contractor has not designated the account, the subcontractor or materialman must demand a designation.

The question arises as to whether the obligation of the subcontractor or materialman to demand a designation of the account creates a duty, and hence a corresponding right, without a remedy? Can a subcontractor or materialman on a public contract thumb his nose at the owner or contractor, refuse to demand a designation of the account, and suffer no consequences from his failure to comply with the statute?

Western Ready-Mix would seem to indicate that owners and contractors have some remedy against persons other than lien claimants, because the case addresses itself primarily to the failure to bond. Moreover, this court in the past has treated the bonding statutes and the lien statutes as analogous. King Bros., Inc. v. Utah Dry Kiln Co., 13 Utah2d 339, 374 P.2d 254 (1962).

There seems to be no reason for applying the statute to lien claims, but not applying it to other construction contracts in which no lien claim is involved, either because the time to file had run or because a public contract is involved. The Western Ready-Mix court applied the statute by analogy to a bonding-type situation, and it is submitted that the statute should be so applied in this case.

As pointed out in 2A Sutherland Statutory Construction (4th ed.) § 55.02, p. 380, we find the following:

> Remedies made available by statute have been extended by courts to permit their use to enforce other rights than those mentioned in the statute, where there is no perceivable reason to differentiate between the rights mentioned and those not mentioned in regard to the suitability of the statutory remedy. And an array of statutory provisions authorizing the use of injunctive remedies in situations where they would not have been available according to traditional doctrine has been considered sufficient basis for extending the remedy of an injunction to other situations not unlike those to which the statutes specifically pertained. * * *

The author also states, in § 55.03, p. 383:

> If a statute which creates a right does not indicate expressly the remedy, one is implied, and resort may be had to the common law, or the general method of obtaining relief which has displaced or supplemented the common law. And where a statute imposes a duty but is silent as to when it is to be performed, a reasonable time is implied.

The statute under consideration creates a right in owners and contractors, and establishes a duty on the part of subcontractors and materialmen. A remedy should be implied, and the remedy that should be implied is that payments made by an owner or contractor from funds received for a particular construction project should be applied as payment for labor and materials supplied to that project.

The subcontractor in this case argues that 58A-1-19 should not be applied because it is contrary to the provisions of 63-56-38 Utah Code Annotated 1953, part of the present statutory scheme relating to public contract bonds. It argues that the following provision in 63-56-38 is inconsistent:

> (3) Any person who has furnished labor or material to the contractor or subcontractor for the work provided in the contract * * * [and who has not been paid] 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.

The argument misses the point of 58A-1-19, which is a statute specifying acts that will constitute payment for labor and materials furnished in connection with construction projects. If 58A-1-19 applies, then the provisions of paragraph (3) do not come into effect, because there is no amount unpaid.

II

BECAUSE OF THE PROVISIONS OF 58A-1-19 U.C.A. 1953, THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT.

In this case there is no dispute as to the source of the funds used by the contractor to pay $52,500 to the subcontractor, or as to the fact that the subcontractor did not demand a designation of the account to which the payment was to be applied, or as to the fact that the payments were applied to other accounts.

If the statute is interpreted as suggested under point I, there is no genuine issue as to any material fact and the surety is entitled to judgment as a matter of law.

If the statute is not given that effect, but is given the effect of permitting the owner or contractor to designate the account upon learning of a misapplication, there is still no genuine issue as to any material fact. The affidavit of John W. Maughan is to the effect that upon learning of the misapplication of the payment he notified the subcontractor that the payment should be applied to the Monticello projects. The subcontractor argues that the subcontractor's president states that no request was made for application of the payment, either before or after its application, but the affidavit is not included in the record on appeal and, in any event, was not filed until after the court had ruled on the surety's motion for summary judgment (R. 90-

CONCLUSION

Under the provisions of 58A-1-19 Utah Code Annotated 1953, subcontractors and materialmen have an obligation to demand from the owner or contractor a designation of the account to which the payment is to be applied. Although the statute specifies a remedy only in connection with persons claiming of liens against the property, the word lien has often been used interchangeably with claims under bonding statutes, and in Western Ready-Mix Concrete Co. v. Rodriguez, 567 P.2d 1118 (Utah 1977), the court applied the statute to a situation in which an owner was being sued for failure to furnish a bond as required by 14-2-1 Utah Code Annotated 1953.

The remedies provided by the statute should be extended to all owners and contractors involved in construction projects, inasmuch as there is no reason for drawing a distinction between public and private contracts so far as the remedy is concerned.

The judgment of the trial court should be affirmed.

Respectfully submitted,

Joel R. Dangerfield
Bryce E. Roe
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Respondent
S&H Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 1983, I served the foregoing Brief of Respondent S&H Insurance Company upon the following counsel of record by two depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

Gary H. Weight, Esq.
Aldrich, Nelson, Weight & Esplin
43 East 200 North
P.O. Box "L"
Provo, Utah 84603
Attorneys for Appellant

Grant M. Prisbrey, Esq.
2155 South Main Street
Salt Lake City, Utah 84115
Attorney for Respondents Maughan

Sheri Halloway