2003

Ed Ingram, Ed Ingram Construction v. Brian Kitts, Sunpeak Holdings Inc. : Reply Brief

Utah Court of Appeals

E. Paul Wood; Littlefield and Peterson; Attorney for Appellees.
Scott B. Mitchell; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

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ED INGRAM dba ED INGRAM CONSTRUCTION, Plaintiff/Appellant, vs. BRIAN KITTS; and SUNPEAK HOLDINGS, INC., Defendants/Appellees.	*	**APPELLANT'S REPLY BRIEF** Case No. 20030604-CA

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PLAINTIFF'S APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT COURT, THE HONORABLE BRUCE LUBECK PRESIDING

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PUBLISHED DECISION REQUESTED

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ARGUMENT

I. THE DOCTRINE OF "ELECTION OF REMEDIES" IS NOT APPLICABLE BECAUSE THE SETTLEMENT AGREEMENT ENTERED INTO BY THE PARTIES SPECIFIES MR. INGRAM'S REMEDY.

Between June 1 and September 10, 2001, Mr. Ingram supplied labor and material for the improvement of Mr. Kitts'[1] Park City real property. Mr. Kitts refused to pay Mr. Ingram the amount due, forcing Mr. Ingram to file the case at bar. Mr. Kitts' transparent purpose for doing so was to try to save himself a few dollars by coercing Mr. Ingram into accepting a lesser sum than that which was truly owed. Mr. Ingram is a small general contractor and Mr. Kitts' refusal to pay the amount due caused both Mr. Ingram and his subcontractors substantial hardship. Two and one-half years later, the day before the trial of this action was scheduled to take place, the parties entered into the Settlement Agreement at issue.

The Settlement Agreement, which was drafted by Mr. Kitts' counsel, required Mr. Kitts to pay Mr. Ingram $68,757.26 on or before March 19, 2003. (R. 0283-288) Despite his promise to do so, Mr. Kitts has never paid any of the settlement amount. The Settlement Agreement

[1]For simplicity, defendants Brian Kitts and Sunpeak Holdings, Inc., will be referred to collectively as Mr. Kitts.

specifically provides that "[i]n the event Kitts and Sunpeak fail to pay Ingram the Settlement Amount ... Ingram **shall be entitled to judgment against Kitts and Sunpeak as prayed for in the Amended Complaint...**" (R. 0284-0285)(emphasis added). At issue on this appeal is whether Mr. Ingram is entitled to judgment in accordance with the parties' specific and unqualified agreement, i.e., "as prayed for in the Amended Complaint," or whether Mr. Kitts is entitled to in effect unilaterally renegotiate the deal after the fact and/or assert defenses which he might have if he had elected to go to trial.

Had Mr. Kitts elected to try this case, Mr. Ingram may or may not have prevailed on his claim for statutory damages as prayed for in Count Four of the Amended Complaint. Mr. Kitts chose not do so, however, and he unequivocally agreed that if he failed to pay the settlement amount Mr. Ingram would be entitled to judgment as "as prayed for in the Amended Complaint." The Amended Complaint specifically prays for "statutory damages in the amount of $20,245.07." (R. 0056) Mr. Kitts' agreement that Mr. Ingram would be entitled to judgment as prayed for in the Amended Complaint was central to Mr. Ingram's decision to enter into the

Settlement Agreement. Mr. Ingram respectfully submits that Mr. Kitts should be required to honor his agreement.

In *Royal Resources, Inc., v. Gibralter Financial Corp.*, 603 P.2d 793, 796 (Utah 1979), the Supreme Court stated that the defense of election of remedies may be waived. Of particular relevance to the case at bar, the Court specifically recognized that litigants may choose to "enter into a stipulation at variance with [the doctrine of election of remedies]." *Id.* Accordingly, even if the doctrine of election of remedies would otherwise apply to this case (which as further demonstrated below it would not), by agreeing that Mr. Ingram would be entitled to judgment as prayed for in the Amended Complaint, Mr. Kitts clearly waived that defense.

II. THE DOCTRINE OF ELECTION OF REMEDIES IS NOT APPLICABLE BECAUSE THE REMEDIES WHICH MR. KITTS AGREED TO ARE CONSISTENT.

Much of Mr. Kitts' argument is premised upon his contention that Mr. Ingram is required to make an election of remedies because Counts One and Four of the Amended Complaint pray for "inconsistent" remedies. *See Royal Resources, supra*, 603 P.2d at 796 (the doctrine of election of remedies presupposes a choice between inconsistent

remedies). Mr. Kitts is clearly mistaken.

To the extent that their compensatory components overlap, the remedies prayed for in Counts One and Four of the Amended Complaint are concurrent and completely consistent. *See, e.g., Equitable Life Leasing Corp. v. Abbick*, 757 P.2d 304, 306 (Kan. 1988)("An election is required only when claims are inconsistent, such as where one claim alleges what the other denies, or the allegations are mutually repugnant"). Generally, remedies are inconsistent when they are based upon incompatible facts. *Farmers and Merchants Bank v. Universal C.I.T. Credit Corp.*, 289 P.2d 1045, 1049 (Utah 1955). The facts alleged in Count One of Mr. Ingram's Amended Complaint are fully compatible with the facts alleged in Count Four. Count One alleges that Mr. Kitts failed and refused to honor his contractual obligations; Count Four alleges that Mr. Kitts' bank failed to honor his checks.

The "test of inconsistency" is set forth in 25 *Am Jur 2d, Election of Remedies* § 20, p.679, as follows:

> For inconsistency to act as a bar, the remedies must proceed from opposite and irreconcilable claims of right, and must be so inconsistent that a party could not logically follow one without renouncing the other.

It is clear that Counts One and Four of Mr. Ingram's Amended

Complaint pass this test. They do not proceed from opposite and irreconcilable claims of right and Mr. Ingram was entitled follow both without renouncing either one. Thus, contrary to Mr. Kitts' contention, the remedies prayed for in Counts One and Four are consistent with each other.

When remedies are consistent, it is the satisfaction of one which operates as a bar to satisfaction of the other. *Farmers and Merchants Bank, supra,* 289 P.2d at 1049. As a consequence, to the extent that they overlap, Mr. Ingram would not be entitled to satisfaction of the compensatory damages prayed for in Count One and also to satisfaction of the compensatory damages prayed for in Count Four because satisfaction of one bars satisfaction of the other. However, after full satisfaction of his **compensatory** damages, Mr. Ingram would still be entitled to satisfy the **statutory** damages prayed for in Count Four.

III. THE PURPOSE AND INTENT OF THE SETTLEMENT AGREEMENT WAS THAT MR. KITTS' FAILURE TO PAY THE SETTLEMENT AMOUNT WOULD RESULT IN THE ENTRY OF JUDGMENT "AS PRAYED FOR IN THE AMENDED COMPLAINT" JUST AS IF THE PARTIES HAD GONE TO TRIAL AND MR. INGRAM HAD FULLY PREVAILED ON ALL OF HIS CLAIMS.

Mr. Kitts contends that "[t]he purpose and intent of the Settlement Agreement is carried into effect by the Court applying the principle that compensation under Count I is

tantamount to a 'payment made prior to Entry of Judgment' under the Settlement Agreement."[2] This contention is fantastic.

"That a mere promise to pay cannot of itself be regarded as an effective payment is manifest." *Farmers and Merchants Bank, supra,* 289 P.2d at 1049 (quoting 40 Am Jur, Payment, § 87). It is equally obvious that the Judgment entered in Mr. Ingram's favor on Count One is not tantamount to a "payment made prior to the Entry of Judgment." In point of fact, Mr. Kitts has still not paid any of the Judgment amount and has gone so far as to file petitions for relief in bankruptcy court to avoid having to do so.

Conversely, Mr. Ingram respectfully submits that the purpose and intent of the Settlement Agreement is clear. Mr. Ingram agreed to compromise his claims, including his claim for statutory damages, provided that Mr. Kitts paid the settlement amount on or before March 19, 2003. In consideration thereof, Mr. Kitts agreed that his failure to pay the settlement amount would entitle Mr. Ingram to the entry of judgment "as prayed for in the Amended Complaint," just as if the parties had gone to trial and Mr. Ingram had

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[2]Brief of Appellees at p. 13.

fully prevailed on all of his claims, including his claim for "statutory damages in the amount of $20,245.07." (R. 0056).

CONCLUSION

Based on the foregoing, Mr. Ingram respectfully requests that the trial court's June 30, 2003 Order be reversed to the extent that it denies Mr. Ingram judgment in accordance with Count Four of the Amended Complaint and that this action be remanded to the trial court with instructions for the entry of judgment in Mr. Ingram's favor for statutory damages in the amount of $20,245.07, returned check fees of $40.00, interest, and attorney fees incurred both before the trial court and in connection with this appeal.

DATED this 23rd day of November 2004.

Scott B. Mitchell
Attorney for Appellant

MAILING CERTIFICATE

Undersigned certifies that two copies of the foregoing were mailed this 23rd day of November 2004 via first class U.S. Mail, postage prepaid, to each of the following:

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