1964

Utah State Building Board et al v. George R. Romney et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STATE BUILDING BOARD, et al,

Plaintiffs,

vs.

GEORGE R. ROMNEY and M. WALLIS ROMNEY, dba G. MAURICE ROMNEY COMPANY, a partnership et al,

Defendants, Third-Party Plaintiffs, and Appellants,

vs.

INDUSTRIAL INDEMNITY COMPANY, a corporation,

Third Party Defendant and Respondent.

Case No. 10143

BRIEF OF RESPONDENT

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STATEMENT OF THE KIND OF CASE

This is a case involving the construction of the terms of a private bonding contract between Appellants and Respondent. It does not involve a statutory bond

or a public bond, but simply the construction of a private agreement made at arm's length for sufficient consideration between Appellants' subcontractor and Respondent bonding company.

DISPOSITION IN THE LOWER COURT

The lower court at pretrial correctly ruled that Appellants' third party complaint should be dismissed with prejudice and upon the merits and the court further correctly determined that Appellants—the prime contractor, and its statutory bonding company, American Casualty Company—had no cause of action against Respondent.

RELIEF SOUGHT ON APPEAL

Respondent seeks to affirm the judgment of the lower court and also for a ruling of this court that Appellants' appeal was not timely filed.

STATEMENT OF FACTS

In July, 1959, defendants and appellants, Romney Company, entered into a contract as prime contractor with the Utah State Building Board for the construction of a rehabilitation center in the University of Utah Medical Center. Defendant, American Casualty Company of Reading, Pennsylvania, furnished the statutory performance and payment bond for the prime contractor, Romney Company, in connection with the job.

Defendant, Walsh Plumbing Company, entered into a subcontract with the prime contractor, Romney Company, to perform the plumbing portion of the prime contract. Romney Company required and obtained from third party defendant and respondent, Industrial Indemnity Company, a private, as distinct from public or statutory, subcontractor's bond (pretrial Exhibit 1) and the judgment (R. 225) of the Court below with respect to this bond is the subject matter of this appeal.

The action was commenced by various laborers, materialmen and suppliers alleging non-payment on the job. Defendant, Romney Company and American Casualty Company, answered and filed their third party complaint (R. 6) alleging that third party defendant, Industrial Indemnity Company, was liable for the payment of plaintiff's claims on account of the subcontractor's bond which it wrote for Walsh Plumbing Company. This bond (Pretrial Exhibit 1) provided that Industrial Indemnity Company, as surety, and Walsh Plumbing Company as principal

> "are held and firmly bound unto G. Maurice Romney Company as obligee, hereinafter called owner, for the use and benefit of claimants as hereinbelow defined * * * to remain in full force and effect subject, however, to the following conditions * * *
>
> 3. No suit or action shall be commenced hereunder by any claimant.
>
> (a) Unless claimant shall have given written notice to any two of the following: The Princi-

pal, the Owner, or the Surety above named, within ninety (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, or for whom the work or labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the Principal, Owner or Surety, at any place where an office is regularly maintained for the transaction of business, or served in any manner in which legal process may be served in the state in which the aforesaid project is located, save that such service need not be made by a public officer."

It was established from the interrogatories of third party defendant and respondent to all plaintiffs and claimants, and the admissions of the parties at pre-trial, that no claimant had complied with the written notice requirements of respondent's bond.

At the pre-trial hearing held on February 21, 1964, the following facts were established by the pleadings, admissions of the parties, and statements of counsel to the pre-trial Judge. (These facts were set forth in the Pre-trial Order (R. 225) numbered in said order as follows.)

3. J. G. Wedding did business prior to October 1, 1961, as Walsh Plumbing Company.

4. On or about October 1, 1961, J. G. Wedding sold the Walsh Plumbing Company to Sylvia Rhode,

who immediately thereafter incorporated the same as Walsh Plumbing Company, a Nevada corporation.

5. Pretrial Exhibit 1 is a bond furnished by Industrial Indemnity Company as surety and J. G. Wedding as principal to the G. Maurice Romney Company, partnership.

8. The parties agree that no one gave any notice to the Industrial Indemnity Company or to Walsh Plumbing Company or to Romney Company as required in Paragraph 3a on page 2 of the Industrial Indemnity Company bond.

9. The Industrial Indemnity Company claims that the bond was not made for the benefit of the Romney Company but was made for the benefit of materialmen, and since no materialmen have given notice as prescribed by Paragraph 3a of the Industrial Indemnity bond, the court will hold as a matter of law that Romney Company cannot recover under Pretrial Exhibit 1.

10. On or about October 1, 1961, the principal was changed from J. G. Wedding, doing business as Walsh Plumbing Company, to the Walsh Plumbing Company, a corporation, but no novation or agreement between the parties or any of them was ever made to the effect that J. G. Wedding was relieved from his contract to perform as made with Romney Company.

17. It is ordered that the action insofar as the Industrial Indemnity Company, a corporation, is concerned be dismissed with prejudice.

The Court signed this Order on February 24, 1964, and the Order was filed and entered upon the direction of the Court, on February 25, 1964. The Order shows that a copy was mailed to all attorneys appearing at the pre-trial.

On March 30, 1964, after the time for appeal had elapsed, defendant and appellant served a Motion to Amend the Pre-Trial Order (R. 229) and this Motion was filed April 2, 1964, and also on April 2, 1964, the Court entered its Order denying the Motion (R. 236) for no good cause shown and for not being timely made. A contention was made by defendants and appellants that the pre-trial judgment and order was governed by Rule 54(b) U.R.C.P., therefore, in order to clarify his intentions with respect to the pre-trial judgment, the Judge on April 2, 1964, made and entered the nunc pro tunc judgment complained of by appellants (R. 233). All the Court did in this judgment was to recite that it appeared to him at the time of pre-trial that there was no just reason for delay and also to expressly direct the entry of judgment, which judgment, as a matter of fact, had already been actually entered by the Court itself on February 25, 1964.

On April 8, 1964, defendant and appellant filed their motion to set aside the nunc pro judgment (R. 252) and this motion was denied by the Court on April 30, 1964. (See Stipulation of the parties, R. 254). Appellants have not appealed from this Order denying their motion to set aside the nunc pro tunc judgment.

ARGUMENT

POINT I.

THE NOTICE PROVISIONS OF RESPONDENT'S BOND ARE REASONABLE AND APPELLANT IS BOUND BY THE TERMS OF THE BOND AND IS NOT ENTITLED TO IMPLY OR READ INTO THE BOND TERMS WHICH ARE NOT THERE.

Most of Appellants' brief under its Points A (1) (2), is devoted to a strange and somewhat specious argument to the effect that in some way Appellants were entitled to sue Respondent bonding company for the "use and benefit" of themselves rather than for the "use and benefit of claimants" as provided in the obligation of the bond.

Appellant, Romney Company was the prime contractor on this job; Appellant, American Casualty Company of Reading, Pennsylvania, furnished the required statutory bond. Apparently, Appellants desired additional bonding with respect to the subcontractor, J. G. Wedding, dba Walsh Plumbing Company. Accordingly, Appellant, Romney Company required its subcontractor to enter into a contractual bonding agreement with Respondent Industrial Indemnity Company. This contract was a Labor and Material Payment Bond, which bond contract is identified in this record as pretrial Exhibit No. 1. In this agreement, Respondent, Industrial Indemnity Company agreed as follows:

1. To be "firmly bound unto Romney Company as obligee, hereinafter called owner, *for the use and benefit of claimants as herein below defined.*"

2. To "remain in full force and effect, subject, however, to the following conditions." These conditions are set forth in Paragraph 3 and 3(a). They, in effect, provide that the owner shall have no rights for the use and benefit of claimants unless claimants have given the required notice as set forth in Paragraph 3(a) of the bond. The plain, ordinary, clearly expressed intent of this bond is that the surety will pay the claims of claimants provided that it be given the requisite notice. This is perfectly valid, and, in fact, usual, subcontract bond condition. Appleman Insurance Law and Practice, Volume 10, Section 6241, states the principle involved as follows:

> "A notice of default provision under a contractor's bond is a valid and enforceable condition precedent to liability of the surety. Failure to comply by giving proper notice to the surety would relieve it of liability" (Citing cases).

The principle is also stated in 50 American Jurisprudence, Section 42, at Page 934, as follows:

> "It is frequently a requirement of fidelity bonds and contractor's bonds that notice of default be given to the insured or surety and if the requirement is reasonable, there must be a compliance therewith in order to hold the surety liable."

Appellants in their brief, cite the Utah case, *Corporation of President of LDS vs. Hartford,* 98 U. 297, 95 P. 2d 736, as supporting their position, but, actually, a fair reading of the holding of the case indicates that the case supports the position of Respondent because the court states that "sureties in building contracts are not entitled to any notice of default *unless* the agreement expressly provides therefor". Here, the bond in question does expressly provide for notice. It is uncontroverted that the notice was not given and, therefore, the trial court's construction of the bond was correct.

Appellants simply state, without any justification therefor in the language of the bonding contract, that what the bond in effect says, is that if claimants fail to give notice as required, then this bond is not for the use and benefit of claimants as it says, but is for the benefit of the obligee and its statutory surety and will permit a suit by them for money owed claimants. It would seem on the face of it that this argument is unsound. If Appellants had wanted a bond which gave them a right to sue in case claimants did not pursue their remedies under the subcontractor's bond, then it would have been a perfectly simple matter for Appellants to require Respondent bonding company to agree to such a right of action in the prime contractor. There is no such provision in the instant bond. It is simply a bond for the protection and payment of claimants for proper claims provided reasonable notice is given as provided in Paragraph 3(a) of the bond.

Appellants state in their brief on Page 8, that Romney, the prime contractor, required Walsh Plumbing, the subcontractor, to furnish a bond "for the satisfactory performance of this agreement" and cite as authority for this statement Exhibit D-16 and "2nd" page of Pretrial Exhibit 1. At the time of the pretrial there was no Exhibit D-16 before the court and there never was any "2nd" page of Pretrial Exhibit 1. This "2nd" page was attached to Pretrial Ex. 1 sometime *after* the record was filed in this court. These alleged exhibits were not offered by Appellants at pretrial, were not before the trial court, and reference to them on this appeal is improper and they are in no way binding upon Respondent. Pretrial Exhibit 1 was and is the bond in question, consisting of one page. It was offered into evidence at the pretrial by Respondent. There was no 2nd page attached to it at that time and Appellants have no right in this appeal to quote this alleged 2nd page obtained from sources unknown to Respondent. In any event, it is not material in this appeal what Appellant Romney may or may not have required of the subcontractor in its subcontract. The fact remains that if Appellant, Romney, did not like the subcontract bond submitted, it was at perfect liberty to refuse the same and obtain one containing terms more to its liking, particularly in view of the position Appellants take in this appeal urging the proposition that they are entitled to read terms into the bond which are not there. A reading of the cases cited by Appellants shows that not one of them supports the construction

of the bond urged by Appellants in this appeal. Obviously ,the obligee is a party to the bonding contract and, obviously, he is entitled to have the terms of the contract performed. No one disputes this proposition, but he is not entitled to turn a simple, ordinary provision, guaranteeing payments to claimants if their claims are properly presented, into a construction that said obligee can recover the amounts claimed by claimants whether the conditions of the bond are met or not. What this case really represents is an attempt by the prime contractor and its bonding company, American Casualty Company of Reading, Pennsylvania, to force a subcontract bond to pay the obligation for which American Casualty is primarily liable under the statute and under its bond.

POINT II

IN ANY EVENT, RESPONDENT WAS COMPLETELY DISCHARGED FROM THE OBLIGATION OF ITS BOND BECAUSE OF A MATERIAL ALTERATION.

The pretrial Judge's order of dismissal with prejudice was not based solely on the proposition that the notice provision of the Respondent's bond had not been complied with. Paragraph 10 of said Pretrial Order (R. 226) explains what happened in this case. On or about October 1, 1961, which was prior to the time of any default by the subcontractor, the Principal in the bond (Pretrial Exhibit 1) was changed. Respondent

wrote this bond for J. G. Wedding, doing business as Walsh Plumbing Company. In October, 1961, J. G. Wedding, dba Walsh Plumbing Company, sold the business to one Sylvia Rhode, who thereafter incorporated the business as Walsh Plumbing Company, a Nevada corporation. (Paragraph 4 of the Pretrial Order, R. 226). As is stated in Volume 50, American Jurisprudence, Section 48, at Page 937:

> "A surety obligation is a contractual one, and like other contractual obligations may not be altered without the consent of the surety who has assumed the obligation."

And, further, Section 50, Page 939, this:

> "The variations or changes in the suretyship contract which, if made without the surety's consent, will discharge him are very often characterized by the courts as 'material' alterations, although it is said in some cases that the surety is discharged whether the alterations are material or not."

The authorities hold without dissent that a change of Principal is a material change in the obligation which will discharge the surety from liability. *Spokane Union Stockyards Co. vs. Maryland Casualty Co.,* 105 Wash. 306; 178 P. 3; 50 Am. Jur. Sec. 130, Page 990; 144 A.L.R. 1267. Respondent bonding company in this case was called upon by Appellants by virtue of their third party complaint to pay the debts of a new and substituted Principal. Appellants did not and cannot show that any notice of this change of Principal was given to Respondent.

POINT III.

ACTUAL NOTICE IN LIEU OF WRITTEN NOTICE IS NOT AN ISSUE IN THIS CASE.

Appellants in their brief at Point I (B), Page 15, attempt to raise an issue of actual notice. This point should not be considered by this court for the following reason. On March 30, 1964, Appellants filed and served a Motion to Amend the Pretrial Order (R. 229) contending that "actual notice was given sufficient to comply with Paragraph 3(a)". On April 2, 1964, (R. 236) this Motion was denied by an Order of the trial court. Appellants have never appealed from this Order. Therefore, this issue has been finally disposed of, and is moot.

POINT IV.

THE PRETRIAL ORDER ENTERED FEBRUARY 25, 1964, (R. 225), WAS A FINAL AND APPEALABLE ORDER AND NO TIMELY APPEAL THEREFROM WAS MADE BY APPELLANTS.

The Pretrial Order dismisses the action completely as far as Respondent, Industrial Indemnity Company, was concerned. The dismissal was with prejudice. All claims of all parties against Industrial Indemnity Company were disposed of by this Order. It was not the kind of situation contemplated by Rule 54(b) when part of the claims against a party are settled and some

remaining claims are left to be disposed of. In many cases, this Court has considered what the essentials of a final judgment are in order to determine whether or not a given judgment is appealable. The Court has held that any judgment, terminating litigation between parties in the court rendering it, is final. *Bear River Valley Orchard Co. vs.Hanley,* 15 U. 506, 50 P. 611; *Stoll vs. Daly Min. Co.,* 19 U. 271, 57 P. 295.

Where the rights of the parties in an action are determined by the court and nothing is reserved for future determination, the judgment with respect thereto is final. *State vs. Booth,* 21 U. 88, 59 P. 553.

The test of finality for purpose of appeal is not necessarily whether the whole matter involved in the action is concluded, but rather whether the particular proceeding with respect to the party involved is terminated by the judgment. *Winnovich vs. Emery,* 33 U. 345, 93 P. 988; *Bristol vs. Brent,* 35 U. 213, 99 P. 1000.

It is quite common under our practice for the pretrial Judge to make a final determination based upon the pleadings and the statements of counsel at the hearing. Sometimes the order entered is in the nature of a summary judgment and sometimes the order disposing of the case is just simply an order based upon the pretrial hearing. In the following cases the court's disposition and judgment at pretrial hearing has been recognized as a final judgment. *R. J. Duam Construction Company vs. Child,* 247 P. 2d 817, 122 U. 194; *Ulibarri vs. Christenson,* 275 P. 2d 170, 2 U. 2d 367.

CONCLUSION

Respondent's bonding contract is clear and unambiguous. Appellants have no right under the agreement to ignore the notice provisions and sue in their own name. The notice provisions are reasonable and were not complied with. The Principal was changed and a new Principal substituted in this contract without the consent of Respondent. Finally, the pretrial conference and judgment finally disposed of all claims against third party defendant and Respondent, Industrial Indemnity Company. It was a final Order. The Order itself recited that the dismissal was with prejudice. Said Order was promptly mailed to Appellants. No one could have been misled with respect to the Court's intention to make it a final Order.

Appellants have shown no reason in this case why they should be permitted to avoid their obligations as the prime contractor and the statutory bonding company and pass the burden of payment on to the subcontractor's bond, contrary to any provision therein or any reasonable and just construction of said bond.

Respectfully submitted,

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