

1965

The American Oil Company v. General Contracting Corp., A Utah Corporation; Federal Insurance Co., A Corporation; and United States Steel Corporation : Appellant's Reply Brief

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

THE AMERICAN OIL COMPANY,
a Maryland corporation,
Plaintiff and Appellant

vs.

GENERAL CONTRACTING CORP.,
a Utah corporation; **FEDERAL**
INSURANCE CO., a corporation;
UNITED STATES STEEL CORP.
RATION, a New Jersey corporation,
Defendants and Respondents

APPELLANT'S BRIEF

Appeal from the Judgment rendered
for Salt Lake City
HONORABLE STEWARD

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No. 10326

APPELLANT'S REPLY BRIEF

SUPPLEMENTAL STATEMENT OF FACTS

Defendants' (respondents') Brief under Point I raised an issue which was not discussed in plaintiff's (appellant's) brief. In order to properly discuss and argue this issue, it is necessary that certain facts concerning the handling of the case in the trial court be set forth. The parties are referred to herein by the same designations as used in Appellant's Brief. This case was argued on two occasions in the district court.

On October 20, 1964, the case was argued before District Judge Marcellus K. Snow on defendants' motion to dismiss. Arguments by each side were brief but in its argument opposing the motion, plaintiff, now appellant, argued two main points, first its claim on the bond required by the Contractors' Bonding Statute, and second its claim based on common law contract principles, specifically that plaintiff was a third party beneficiary under the construction contract between defendant, U. S. Steel and the State of Utah. The court denied the motion to dismiss.

On January 20, 1965 at a special setting before Judge Stewart M. Hanson on cross motions for summary judgment, the case was argued at length. On that occasion, counsel for plaintiff devoted about half his argument to the common law contract claim (third party beneficiary) and cited cases and authorities in support thereof, including *Smith vs. Bowman*, 32 Utah 33-39, 88 P 687 and *State vs. Campbell Building Co.*, (Utah 1938) 77 P 2d 341. Defendants' counsel responded to this argument arguing among other things that the bonding statute was plaintiff's exclusive remedy. On both occasions, defendants were represented by the same counsel who prepared Respondents' Brief.

POINT I

PLAINTIFF'S COMMON LAW CONTRACT CLAIM, THAT PLAINTIFF WAS A THIRD PARTY BENEFICIARY UNDER THE CONSTRUCTION CONTRACT, WAS CONTAINED IN THE PLEADINGS AND WAS RAISED IN THE TRIAL COURT.

Point I in defendants' (respondents') brief raises a new issue not considered in plaintiff's (appellant's) Brief.

It is asserted in the title of said Point I that "The Third Party Beneficiary Theory . . . Was Neither Raised Nor Preserved In The Record On Appeal. . . ."

Plaintiff's Complaint, R. 1, 2 and 3, contains allegations of facts sufficient to constitute a claim in common law contract. Furthermore, as set forth in the Supplemental Statement of Facts, on two occasions in the trial court, the issues of the case were argued and on each occasion, defendants' counsel being present, plaintiff argued the common law contract claim and theory.

An analysis of the complaint reveals that it alleges facts sufficient to state both claims, the one on the bond and bond statute and the other on the contract. The Complaint contains the following essential allegations of fact: That the defendant, contractor, U. S. Steel, entered into a contract with the State Road Commission of Utah whereby U. S. Steel agreed to furnish the labor, equipment and materials necessary to perform work in the construction of one steel arch bridge; (a copy of the contract is attached to the Complaint, marked EXHIBIT "A" and by reference made a part thereof); that the Subcontractor was a subcontractor of U. S. Steel, and, in the prosecution of the work required under the contract ordered and received materials from plaintiff which were used in the prosecution of the work; and that said materials were of a certain value and payment had not been received therefor. (A copy of the bond, EXHIBIT "B" was also attached to the Complaint and made a part thereof.) Then follows paragraph 9 of the Complaint which alleges: "Pursuant to EXHIBITS "A" and "B," the defendants Contractor and Surety *also* owe plaintiff \$3,773.00." (Emphasis added) Nowhere in the Complaint is it alleged that the only claim or cause of action is on the bond. The Complaint alleges more than

would be necessary if the only claim intended had been on the bond. If the claim on the bond was all that had been intended, paragraph 9 of the Complaint would be surplusage. The inclusion of the term "also" in paragraph 9 is noted, indicating that in addition to other claims plaintiff also asserted its claim under the contract.

Defendants point out in their brief that plaintiff filed no memorandum in the trial court. This is true but the filing of a written argument or memorandum is not a prerequisite to the preservation of a claim or theory on appeal. Plaintiff's common law contract claim was adequately set forth in the Complaint.

Defendants assert that plaintiff's Complaint contains only one count. The Complaint, R. 1, 2, and 3, contains 12 paragraphs and a prayer. It is not subdivided by counts. The rules do not require that separate causes of action be stated in separate counts.

The party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses.

Rule 8(e)(2), Utah Rules of Civil Procedure

One of the prime purposes of modern code pleading, specifically the new rules as adopted in Utah, was to simplify the technical requirements of pleadings; to provide that facts rather than law be plead. It is not essential that a pleader specify the theories.

Judge Charles E. Clark speaking on this point has said.

If the plaintiff is to be expected to state only the past occurrences between the parties, and the court is then to grant him such relief as those occurrences justify, it should be immaterial that he called his

action one of tort, whereas the court thought it was one of contract, or one in "equity," whereas the court thought it one "at law." This has been ruled many times by able courts. . . . Therefore, he should not be forced to fulfill any requirement of having and maintaining a single legal theory of his pleadings; he should be held only to the ideal of reasonably fair notice of the facts of his case.

Clark on Code Pleading,
Second Edition, p. 261.

Defendants' main theme seems to be that plaintiff failed to raise its "contract theory" in the lower court and preserve it in the record. Under the rules it is not the theory that must be plead but rather facts sufficient to state a claim.

The rule on this point is well stated in one of the texts.

Under modern practice, where the test of sufficiency of plaintiff's initial pleading is whether, if the facts therein alleged are admitted or proved, he is entitled to recover against defendant . . . and under which practice if plaintiff is entitled to some relief under the facts which he has set forth he will be granted such relief, although it differs from the relief for which he prayed . . . it has been considered that plaintiff is not obligated to forecast with absolute accuracy the theory of either the law or the facts on which he will rely at the trial, and that while good practice calls for a definite theory, the mere absence of such a theory is not of itself fatal to a complaint.

The statement continues:

Moreover, the fact that the complaint is drawn on an erroneous theory will not prove fatal where it alleges facts sufficient to support the judgment. Accordingly, it is frequently held that, if the complaint states a cause of action on any theory, it is sufficient, that the

facts alleged need not be such as to entitle plaintiff to recover under any particular form of action, and that the petition need not be invulnerable as against a motion to make more definite and certain.

The statement then concludes:

If a complaint sets up two theories of recovery, and the major theory fails, plaintiff may avail himself of the minor theory if this works no injustice to his opponent, and, if a plaintiff adopts a wrong theory and fails to prove the cause of action intended, where he proves any other cause of action embraced by the allegations in his pleading, he may recover on that.

71 C.J.S. 228, 229, Pleading,
Section 92. To the same effect see also
41 Am. Jur. 347, Pleading, Section 81.

The intent of the drafters of the new rules that they should serve the ends of justice and not deny justice by technicalities is particularly indicated in certain of the rules. Rule 54(c)(1) provides:

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

See also "Some of the Purposes and Effects of the New Utah Rules of Civil Procedure," 2 Utah Law Review 21.

In a recent Utah case decided by this Court where the court considered generally the question of pleading a proper theory, it said:

"Sec. 104-1-2, U.C.R. 1943 provides:

There is in this state but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs."

Under this section this court has held that a pleader is not required to follow any particular form or special theory in stating the facts, and if the facts stated entitled plaintiff to any relief under the substantive law, then he has stated what is termed "a good cause of action," and the court must enter judgment in his favor so far as any attack upon the sufficiency of the pleading is concerned.

Hanson vs. Openshaw, (Utah 1945)
155 P. 2d 410.

In a suit between partners to establish a partnership and to recover for partnership property allegedly diverted by defendants, this court had under consideration the sufficiency of an amended complaint and the question arose as to whether the complaint embraced two causes of action, one to declare the existence of a partnership and for an accounting and the other sounding in fraud, the court noted:

It is not necessary to designate the type of action. The code only requires a statement of the facts constituting the cause of action in ordinary and concise language.

Further on in the decision the Court continues:

It is not required that a series of transactions so closely related in time and fact as to produce a substantial cause and effect transition be grouped and compartmentalized so as to fall into designated types of legal actions. The law serves life. Reformed pleading unlike that of common law is not a straight jacket which allows no freedom of movement. Life and the books are replete with cases where the alleged wrong emanates or evolves from a series of related transactions in which various actors have played varying parts with varying degrees of guilt or delict. The wrong chosen from the whole of the facts as a basis for the action is nonetheless so because a separation and grouping of some of the

transactions along the way may disclose other lesser or incidental wrongs which could themselves have been made the basis of causes of action of a conventional type.

Graham vs. Street (Utah 1946)
166 P. 2d 524

See also *California Land & Construction Co. vs. Halloran*
(Utah 1932) 17 P. 2d 209

Defendants rely heavily on *Dix Lumber Company vs. City of Boston*, 289 Mass. 291, 194 N.E. 117, asserting that the precise question now before this court was before the Supreme Judicial Court of Massachusetts in that case. We submit that the precise question before the court now was not considered by the Massachusetts court in that case. The holding there differs in several respects. The primary question was whether materials furnished by the Plaintiff on a public construction project had been "used or employed" as those terms were used in the statute. The decision was that since none of the materials were incorporated in the finished structures or were entirely destroyed in prosecuting the work, the materialmen could not recover. That case differs from this case in the following respects:

(1) There a new argument was raised for the first time in oral argument before the appellate court. Here, all arguments now being made were made before the trial court. (2) There, the Appellants contended that even though they could not recover under the terms of the statutory bond, they should be entitled to recover on a common law bond theory. Here, plaintiff is not contending to recover on a common law bond theory as to the surety; rather it is contending to recover under the contract of the general contractor on a common law contract theory. (3) There, Appellant had sought recovery solely on the bond. Here,

plaintiff seeks recovery on one claim on the bond and on the second claim on the contract.

The case of *Pettingill vs. Perkins*, 2 Utah 2d 266, 272 P 2d 185 cited and quoted from by Defendants is foreign both to the issues and circumstances of this case. In that case, a suit by a father against a motorist for injuries to his son, the trial court at the Plaintiff's request gave instructions covering the contributory negligence of the mother. On appeal, the Plaintiff argued that the negligence of the mother, if any, was immaterial. The main point of the decision is contained in the following statement in the decision immediately preceding the statement quoted on page 8 of Respondent's Brief:

Furthermore, it is well established that a party cannot assign as error the giving of his own requests. He cannot lead the court into error and then be heard to complain thereof.

The rule cited in Defendants' Brief from the *North Salt Lake vs. St. Joseph Water and Irr. Co.* case, 118 Utah 600, 223 P 2d 577, is not applicable because here, unlike the circumstance there, the issues were initially raised in the court below.

Defendants argue that plaintiff has shifted its theory on appeal. Plaintiff's claims, causes of action, theories, etc., have always been present in the case, as set forth in the facts alleged in the Complaint and such claims or theories were argued with Defendants on two occasions in the trial court. Even if there were merit to Defendants' argument, as the foregoing authorities conclude, a party may rely on whatever theory or claim may be supported by the facts alleged in the Complaint.

POINT II

THE CONTRACTORS' BOND STATUTE IS NOT EXCLUSIVE AND HAS NO RESTRICTIVE EFFECT AS TO A CLAIM BY A MATERIALMAN AGAINST A CONTRACTOR ON THE LATTER'S CONTRACT.

Plaintiff acknowledges that the bond here involved was furnished pursuant to the requirements of the Contractors' Bond Statute, Chapter 1 of Title 14, (either the old statute, Sections 14-1-1 through 14-1-4, or the new statute, Sections 14-1-5 through 14-1-9). Plaintiff further acknowledges that the requirements of the statute are applicable as to claims on the bond. However, under the circumstances of this case, plaintiff has, and has asserted two claims, one on the bond and the other on the contract; the latter to pursue its rights as a third party beneficiary under such contract.

A prime purpose of the Utah Contractors' Bond Statute, Chapter 1, Title 14 was to protect materialmen in circumstances where the contractor and subcontractor became defunct or insolvent. *Campbell Building Co. vs. District Court of Millard County*, 90 Utah 552, 63 P 2d 255. The statute required the furnishing of a bond and provided that if the bond were not furnished the materialman could bring an action against the public body. The statute contained a statute of limitations and certain procedural requirements which plaintiff acknowledges must be recognized in pursuing a claim on the bond. Defendants, however, appear to ignore the right that a materialman has to proceed against the contractor independently of the bond. Although the enactment of the Contractors' Bond Statute, Chapter 1 of Title 14, afforded a materialman additional protection by making available to him the payment bond,

the statute was not intended to deprive the materialman of ordinary contract rights that he might otherwise have against the contractor.

The enactment of the Contractors' Bond Statute, afforded the materialman an extra remedy — an action on the bond against the surety and contractor. Without the statute a materialsman normally had a contract action against the contractors for supplying and furnishing labor and materials. The Contractors' Bond Statute did not destroy this right of action. The statute requires the bond — it does not require the contract. The bond exists apart from the contract and the contract apart from the bond and although one may refer to the other; different rights and obligations are created by each. See *Nash Engineering Co. v. Marcy Realty Corporation*, (Ind. 1944) 54 N.E. 2d 263. In suits on the bond, the limitations and requirements stated in the statute are applicable. Such statutory limitations and requirements have no application with respect to suits against the contractor on the contract.

The essential circumstances of this case which are relevant to this Point are as follows: The contractor, respondent, U. S. Steel, entered into a written contract with the State of Utah agreeing to construct a steel bridge and furnish all materials and supplies therefor. (The bonding statute did not require this contract.) By the terms of this contract, certain other documents including the bond were specifically made a part of the contract. One provision of the bond provides that the contractor shall pay all materialmen, including materialmen of subcontractors. U. S. Steel engaged the subcontractor to perform certain work on the bridge and at the subcontractor's request plaintiff furnished materials which were used on the project. Under the clear language of the contract and on ordinary principles of

contract law plaintiff was a third party beneficiary entitled to recover from U. S. Steel for the value of the materials supplied.

Defendants fail to distinguish between plaintiff's claim against the contractor on the contract and plaintiff's claim against the surety and the contractor on the bond. As heretofore stated, the contract between U. S. Steel and the State of Utah was not required by the bonding statute and rights and obligations which arose out of this contract must be determined by looking to the provisions of the contract itself and principles of contract law. The requirements of the statute in no way affect the rights and obligations created under the contract.

It is significant to note that although plaintiff, in pursuing its contract claim, relies on certain language in the bond, such language is relied on only as it constitutes a part of the contract. As heretofore stated, the contract expressly provided that the bond become a part of the contract. The bond itself is not relied on as an instrument creating liability. It is the contract which creates in plaintiff its rights as a third party beneficiary and certain provisions of the bond are applicable as they constitute a part of the contract.

Plaintiff has no serious dispute with the cases cited by Defendants under Point II of their Brief. The essential holding in those cases is that where a materialman files suit on a bond given pursuant to the requirements of a statute the bond must be construed together with the statute, and the remedies afforded by the statute are exclusive, *so far as a claim on the bond is concerned*. (Emphasis added) But those cases are not applicable. Here we are considering plaintiff's claim on the contract. Those cases do not hold that the bonding statutes restrict or

preclude contract actions by materialmen against the contractor based on the construction contract.

On page 14 of their Brief, Defendants cite and rely upon *General Electric Supp. Corp. v. Willey Electric Co.*, 47 Ohio App. 196, 191 N.E. 706. The court there held that the statutory remedy was exclusive as to the surety company, but the case makes no reference as to any claim against the contractor. It is probable, as is the situation in most of such suits, that the contractor was either defunct or insolvent. Nowhere in the case is there reference to a claim by the materialman against the contractor on the basis of contract, as is the situation here, and that case does not hold that the remedy provided in the bonding statute is exclusive so as to prevent a claim against the contractor on contract.

Defendants argue in their Brief that plaintiff "seeks to appropriate unto itself the benefits of the statute without being bound by the necessary and incidental statutory obligations." This is not so. Plaintiff acknowledges that on its claim on the bond the requirements and obligations of the statute apply. However, plaintiff's claim on the contract is entirely apart from the statute and therefore the statutory requirements do not apply.

We have heretofore, under Point I, discussed the case of *Dix Lumber Company vs. Boston, Supra*, pointing out that the ruling in that case is inapplicable to the circumstances of this case.

In *Standard Sanitary Manufacturing Co. vs. Southern Surety Co.*, 59 S.W. 2d 291, (Tex. Civ. App. 1933), cited on page 15 of Respondents' Brief, the Texas court held that even though the bond created common law obligations independent of the statutes, since the bond was given pur-

suant to the requirements of the statute, the bond must be construed in connection therewith and the remedies afforded by the statute were exclusive. The court therefore held that any common law rights created by the bond were not enforceable. Plaintiff is not here pursuing common law bond obligations. It is rather pursuing common law contract obligations arising out of U. S. Steel's contract.

Defendants' cited cases may have application to plaintiff's claim on the bond against the surety and the contractor but those cases do not apply to plaintiff's claim against the contractor on the contract.

The issue presented in this case seldom arises because in most situations, the contractor and the subcontractor are not involved in the suit, they being insolvent.

Plaintiff submits that *State vs. Campbell Building Co.*, 94 Utah 326, 77 P. 2d 341, cited in both plaintiff's and defendants' briefs, contains a clear statement of the law supporting plaintiff's position; that aside from rights on the bond the materialman has a separate claim against the contractor not restricted by the statute. The case is discussed on page 10 of plaintiff's brief and on page 18 of defendants' brief. Defendants misconstrue the meaning of the statement from the case quoted and italicized in their brief at the bottom of page 18, particularly the following:

"It is only when it is sought to hold the surety – only when recovery is to be made under the bond – that the provisions of the statute come into play."

A proper interpretation of this statement means simply that the provisions of the statute come into play when a claim is made on the bond. It certainly does not mean that the provisions of the statute come into play so as to restrict or preclude a separate claim made on the contract.

Respondents contend that appellant is not a creditor of the contractor, U. S. Steel. It is submitted that appellant is a creditor of said contractor. It is a creditor by virtue of the terms of U. S. Steel's contract with the State of Uah. By the terms thereof, plaintiff became a third party beneficiary on the basis of established principles of contract law. The rule is well stated in Corbin on Contracts, Vol. 4, Section 779 I, pages 60, 61, quoted on pages 9 and 10 of plaintiff's (appellant's) brief. (See also *Nash Engineering Co. v. Marcy Realty Corporation*, supra.)

CONCLUSION

The judgment of the trial court should be reversed and judgment be entered in favor of plaintiff against U. S. Steel on the basis of plaintiff's contractual rights under the construction contract bond.

Respectfully submitted,

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