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# Utah Steel & Iron Company v. Skyline Construction Company : Respondent's Brief

# In the Supreme Court of the State of Utah

UTAH STEEL & IRON COMPANY,

*Plaintiff-Appellant,*

- vs. -

SKYLINE CONSTRUCTION COMPANY,

*Defendant-Respondent,*

CASE NO. 11958

## RESPONDENT'S BRIEF

Appeal from Judgment of the
Third District Court for Salt Lake County
Hon. Leonard W. Elton, Judge

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## STATEMENT OF KIND OF CASE

This is an action by a steel materialman against a general contractor claiming $2642.69 due on two separate contracts.

## DISPOSITION IN LOWER COURT

The Third District Court in and for Salt Lake County, the Honorable Leonard W. Elton, sitting without a jury, on October 22, 1969, entered judgment (styled "Decree") for plaintiff for $611.99, plus interest thereon at

6% from September 9, 1967 and costs (R-18). On defendant's motion to retax costs and to amend decree, the Court, on December 9, 1969, amended the judgment to allow interest from September 9, 1967 only on $159.00 of the $611.99 judgment and disallowed a $6.60 witness fee claimed by plaintiff's president (R-23). Plaintiff appeals only from the judgment of December 9, 1969 (R-26).

## RELIEF SOUGHT ON APPEAL

Defendant-respondent prays the judgment be affirmed and that defendant recover its costs on this appeal.

## FACTS

Plaintiff's brief states only the evidence favorable to it. Since the Court found the issues in defendant's favor, defendant must restate the facts.

The parties entered into a written contract for plaintiff materialman to furnish 80 rocket rails to defendant general contractor on a job for the U. S. Government (R-35). The rails were each 74.5 feet long, and used to guide rockets into a storage facility, much like railroad track (R-90). Plaintiff's contract was $45,506.88 (R-1) plus $74.00 in extras (R-1, 115). Defendant paid $44,030.19 (R-1, 10) and made a disputed backcharge of $1,097.70

for welding the rocket rails, leaving a balance of $452.99 which defendant sent to plaintiff by check dated January 8, 1968, marked "rocket assembly account in full." Plaintiff kept the check and produced it in Court on trial on October 20, 1969 (R-43, 44). Plaintiff admitted that defendant had always tendered and offered to pay the $452.99 and did not dispute the backcharge until counsel was hired in February, 1968 (R-63, 64).

Additionally, and on a separate job in August, 1967, the Evanston, Wyoming High School, plaintiff supplied six metal brackets to defendant's special order. Price for the furnishing was never discussed and defendant thought plaintiff was volunteering to supply them as a good will gesture to influence the awarding of other work to plaintiff (R-98). In February, 1968, when plaintiff's counsel wrote demanding payment of $2,642.69, defendant inquired of a $1,092 charge included therein and learned for the first time plaintiff claimed $1,092 for the brackets (R-98, 100). Defendant produced expert testimony that the six brackets could be bought for $69.00 (R-85), so defendant disputed this bill.

The $1,097.70 disputed backcharge, the $1,092.00 disputed charges for the brackets plus the $452.99 tendered comprise plaintiff's total complaint of $2,642.69 (R-1).

The evidence in detail follows.

The respective Presidents of the parties met (R-60). Brewer, plaintiff's President, said installation of the rocket rails would be the tough phase of defendant's contract and that if plaintiff could supply the 80 rails in 80 single pieces, it would save defendant considerable money (R-88), for if supplied in pieces it would be very expensive to align and weld them together in the field (R-120). Plaintiff's agreement to furnish the rails in one piece was a great influence in defendant's awarding the contract to plaintiff. (R-89).

A written contract, signed by each party's President, was executed (R-35), specifically requiring the rocket rails to be furnished in one piece (R-36). The contract said:

> "The contractor may add to or deduct from the amount of work covered by this agreement, and any changes made in the work involved shall be by a written amendment hereto setting forth in detail the changes involved and the value thereof, which shall be mutually agreed upon between the contractor and subcontractor if such be possible, but if such mutual agreement is not possible, then the value of the work shall be determined as provided in Section 8." (R-60).

According to Brewer, following signing of the contract, James Mahas came to plaintiff's office, and, as Brewer did not know him at the time, indentified himself as the defendant's superintendent on the rocket as-

sembly job and asked that the rails be shipped in two pieces (R-37). Brewer did not ask the superintendent if he had authority to make this change in the written contract and did not check with anyone at Skyline to see if had the authority (R-61). Brewer had known defendant's President, Holbrook, and its Secretary, Bud Mahas, for years (R-60). Even though his contract negotiations had been made with Holbrook and even though he did not know James Mahas, Brewer "assumed" James had authority to modify the written contract signed by Holbrook (R-46).

Three to four weeks later, in June, 1967, plaintiff shipped the rails in two pieces (R-59) although there was still no written amendment or written change order to the written contract or other contact with anyone on behalf of defendant but James (R-61).

When the rails arrived at the jobsite each in two pieces, Holbrook called Brewer. Brewer declined to weld the rails at the jobsite, but admitted $1,000 would be charged if plaintiff did the work (R-45). Defendant's actual charge for doing the work was $1,097.20, the reasonable cost therefor (R-95, 96). Defendant backcharged that amount to plaintiff and on January 8, 1968, sent plaintiff a check for the $452.99 balance due on the rocket rail contract after the backcharge.

Defendant denied James Mahas ordered the rails shipped in two pieces. There was no reason so to do (R-100). All changes or anything incidental to the job were reported in the foreman's daily report kept daily by the job superintendent and there was no indication of any change in the contract on the job but was indication to backcharge plaintiff (R-93, 94). James Mahas, as job superintendent, did not have authority to permit the rocket rails to be shipped in pieces (R-63). Brewer testified the reason he did not ask James if he had authority to make the change, but "assumed he must have had the power to do this" (R-46), was that "the superintendent usually has authority to change something if it doesn't cost more money" (R-61). Here it did cost $1097.70 more money.

In September, 1967, defendant's need for six metal brackets arose when plaintiff's President, Brewer, happened to be in defendant's office. Brewer said his shop was down on work and that he could get the brackets right out. Brewer was trying to get a subcontract on the Evanston High School job from defendant and defendant was under the impression that Brewer would supply the six brackets as a good will gesture. Price was never discussed. Defendant usually had this type of work done by persons other than plaintiff and sources were readily available for such (R-97, 98).

In February, 1968, defendant received a demand from plaintiff's counsel for $2,642.69 including an item

of $1,092. Defendant, having received no such invoice, asked plaintiff's counsel for explanation and received an invoice back dated September 9, 1967 of $1,092 for six brackets (R-98, 100). Defendant presented expert testimony that the reasonable market price for producing the brackets was $11.50 each, including $7.00 labor, $3.00 materials and $1.50 profit, or a total of $69.00 (R-80, 82, 85). Plaintiff's President testified that he made the six brackets for a total cost of $170 (R-54), but he added into the bill $900 for "loss caused by interruption of other work" (R-14, 54). He admitted defendant could have purchased the six brackets for $250 elsewhere (R-57). Brewer denied that the sending of the invoice for $1,092 had anything to do with his finding out how much the backcharge of $1,097.20 was on the other job (R-52).

Defendant moved for a continuance to produce Jim Mahas as a witness. Plaintiff resisted and the trial Court denied the motion (R-345). The parties at trial waived findings of fact and conclusions of law (R-136) and all exhibits were withdrawn. (R-17).

On October 22, 1969, the trial Court entered judgment against defendant for $611.99 with interest thereon from September 9, 1967 and costs (R-18). Defendant objected to the witness fee claimed by plaintiff for its president Brewer and to the allowance of interest on the $452.99 by motion to amend (R-19). On December 9, 1969, the Trial Court disallowed the claimed witness fee for

Brewer and amended the judgment of October 22 to allow interest only on the $159.00 from September 9, 1967, but not on the $452.99.

Plaintiff's notice of appeal appeals from the "judgment entered in the above-entitled matter on or about the 9th day of December, 1969" and not the judgment of October 22, 1969 (R-26).

## ARGUMENT

### POINT I.
### PLAINTIFF IS PRECLUDED FROM APPEALING THE ALLOWANCE OF DEFENDANT'S BACKCHARGE FOR WELDING.

Plaintiff's notice of appeal designates only the judgment of December 9, 1969, as the judgment appealed. All the order of that date did was reduce the costs and interest allowed plaintiff but not affect the allowance to defendant of its backcharge. Until the brief was filed herein, defendant had no notice that plaintiff was appealing from anything other than the reduction of interest and costs. Rule 73(b) U.R.C.P. requires an appellant to designate the judgment or part thereof appealed from. *Nunley v. Stan Katz Real Estate, Inc.*, 15 Utah 2d 126, 388 P. 2d 798 held that where the later judgment was void and different from the earlier valid judgment, defendants, having served notice of appeal designating the later

judgment, were not entitled to contest on appeal the earlier judgment. That is the case here, for had defendant known plaintiff was appealing from the judgment of September 9, 1969, allowing defendant's backcharge, defendant would have cross appealed on the award to plaintiff of more than $452. and any costs.

## POINT II.

## THE COURT DID NOT ERR IN ALLOWING DEFENDANT'S BACKCHARGE FOR WELDING.

Plaintiff's appeal in this regard is merely rearguing the facts in plaintiff's favor and disregarding the conflicting evidence in defendant's favor, even though the trial Court found the fact issues in defendant's favor. There is evidence that defendant's superintendent, Jim Mahas, did not request plaintiff to ship the rails in two pieces (R-93). There is evidence he did not have authority so to do (R-93). Defendant wanted them delivered in one piece (R121) and the written contract so specifically required (R-34). Brewer had known defendant's officers for years and had dealt specifically with them on this written contract, but says he relied on defendant's superintendent, whom he did not know before, for verbal change in the written contract, did not ask the superintendent if he had authority to change the contract, did not check with defendant's officers to see if the superintendant was authorized, although he had a month so to do, and did not obtain any sort of writing as to the modification in the

next month. The scope of apparent authority and whether plaintiff reasonably relied thereon are questions of fact for the trial Court. Certainly, plaintiff cannot rely exclusively on the agent for establishment of the scope of the agent's authority.

The evidence here fairly supports the judgment and appellant's point is, therefore, not well taken.

## POINT III.

## THE COURT DID NOT ERR IN DISALLOWING THE WITNESS FEE OF PRESIDENT BREWER.

Brewer was the principal stockholder and president of plaintiff and was the only witness representing plaintiff on trial. He remained in the courtroom during the trial as a party not withstanding invocation of the rule excluding witnesses, Rule 43(f), U.R.C.P. (R-23).

*Western Creamery Co. v. Malia,* 89 Utah 422, 57 P. 2d 743 (1936) approves authority that one who attends court as the agent of a party, necessarily attending to the conduct of a suit, cannot be allowed witness fees although he testifies. It further says that compensation will be allowed a corporate officer who attends as a witness in the corporation's behalf where the corporation is a party but in which the witness has no private interest, unless the witness is in court necessarily attending to the conduct of

the suit. See 57 ALR 2d 1245 for cases holding that the president of the plaintiff corporation is not entitled to witness fees, that every case must stand on its own merits, and that the executive or other officer of a corporation who appears in court in a representative capacity is de facto in court as the corporation and is not entitled to witness fees.

*Stratton v. West States Construction*, 21 Utah 2d 60, 440 P.2d 117, cited by plaintiff, is not in point. That case holds the president cannot be personally held liable for the corporate fraud when he was not acting for his own benefit, whereas, here, plaintiff corporation is seeking a personal benefit for its own president for his performance of his duties as president for and on behalf of plaintiff corporation. The next sentence of the *Stratton* case is much more aptly quoted than the one plaintiff quoted, for it says "A corporation can act only through its agents."

Where the statute does not define the items of recoverable cost, the allowance or disallowance thereof is confided to the discretion of the trial court, which will not be disturbed on appeal unless abused. 20 Am. Jur. 2d, Costs, section 52, p. 41. See *Rickenberg v. Capital Garage*, 68 Utah 30, 249 P. 121.

## POINT IV.

## THE DISTRICT COURT DID NOT ERR IN DISALLOWING INTEREST ON THE $452.99 TENDERED TO PLAINTIFF.

Defendant sent the $452.99 check to plaintiff as full payment on the rocket rail job. The Court found that to be full payment on that job and allowed plaintiff an additional $159 for the brackets on the Evanston High School job. Plantiff kept defendant's check and returned it after trial. No objection was ever made to the form of the tender and no question whatever was raised as to the fact that defendant had always offered and tendered to pay that amount (R-50). Defendant's answer alleged prior and continued tender to plaintiff of that amount (R-10).

Rule 68 (a) says that if defendant alleges in its answer that before commencement of the action he tendered to plaintiff the full amount to which plaintiff was entitled and thereupon deposits it in court, and the allegation is found true, plaintiff cannot recover costs, but must pay costs to defendant. That rule does not govern interest. Even if it did, plaintiff precluded defendant from depositing the money into court by keeping defendant's check and by failing to request it be paid into Court in the light of the tender pleaded in the answer. See 78-27-3, U.C.A. 1953.

In *Hirsh v. Ogden Furniture,* 48 Utah 434, 160 Pac. 283 (1916), this Court held that a plaintiff may waive his right of having the money paid into Court to perfect a tender and that he does so ordinarily when he fails to call the Court's attention to the fact that the money has

not been produced in Court because, under such circumstances, the money would in all probability be produced in Court just as soon as plaintiff insists upon his right to have it there.

By the great weight of authority, one who tenders that which is due and owing prior to commencement of suit cannot be held for costs and attorneys' fees. *Home Owners Loan Corporation vs. Washington,* 108 Utah 469, 161 P. 2d 355. Plaintiff's only demand for payment on the brackets was for $1,092, which included $900 "for loss of business". Plaintiff's own testimony indicated this figure was outrageous and unreasonable. The only independent evidence indicated the true value of the units to be $69.00. The trial Court was extremely generous in allowing plaintiff $159 therefor and could well have found them to be a favor as Defendant thought plaintiff was furnishing the units free. Regardless of that, it is certain that interest does not begin to run until proper demand has been made for payment. Certainly plaintiff's $1,092 invoice is not such a proper demand. Under these circumstances it is extremely burdensome and inequitable to charge defendant with costs in the trial court of $33.40 or any interest whatever. Certainly the Trial Court did not err in disallowing interest on the $452.99.

## CONCLUSION

This whole matter is frivilous. First, plaintiff waived findings of fact and conclusions of law, consented to withdrawal of exhibits, and then attempted to appeal. The appeal is from the order disallowing some interest and costs, de minimis matters, but plaintiff's brief argues as to the allowance to defendant of a backcharge of any amount much larger than the judgment recovered by plaintiff. As to that, plaintiff argues only the disputed facts in plaintiff's favor. Defendant prevailed in its $1,097.70 setoff and showed that it had always tendered to plaintiff $452.99 balance due on the one job involved. On the other job involved plaintiff claimed and billed defendant an outrageous amount of $1,092.00, and ended up with a $159 recovery.

This Court should not only affirm the Trial Court but should award defendant its costs herein. Plaintiff is indeed fortunate that the Court below allowed plaintiff any interest and costs.

Respectfully submitted,

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