1970

Ross Telford D/B/A Telford Construction Co. v. Newell J. Olsen And Sons Construction Company : Brief of Appellant

No. 12119

In The Supreme Court of the State of Utah

ROSS TELFORD,
d/b/a Telford Construction Co.
Plaintiff - Respondent

vs.

NEWELL J. OLSEN AND SONS CONSTRUCTION COMPANY,
a corporation
Defendant - Appellant

CASE NO. 12119

BRIEF OF APPELLANT

An appeal from the Judgement of the District Court of the First Judicial District In and For Cache County, the Honorable VeNoy Christoffersen Presiding.

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CASES CITED

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STATEMENT OF NATURE OF THE CASE

This mater arises out of judgement of The First Judicial District Court, granting Plaintiff judgment on his complaint and denying Defendant judgment on its counterclaim. The judgment on Plaintiff's complaint is based on a number of claims. First, Plaintiff claims under a construction subcontract for money offset by the Defendant from the contract price. Second, Plaintiff claims money due for extra work performed under change orders under the same construction subcontract. Third, Plaintiff claims damages resulting from interferance with Plaintiff's performance under said construction subcontract, by the Defendant. Fourth, Plaintiff claims money due for equipment rental in performing work not covered by the construction subcontract. Fifth, Plaintiff claims money due under an oral bonus contract.

Defendant's counterclaim is based on Defendant's claim for money due under an Addendum Agreement for money loaned and not repaid pursuant to said agreement.

Agreement of Subcontract. The transactions which are relevant to Defendant's appeal follow below.

FIRST: During the course of performance of said Agreement of Subcontract, the Defendant employed another subcontractor to perform certain clean up work to Plaintiff's subcontract, after Plaintiff failed to perform said work in accordance with specifications. (T.356, 357) Defendant offset the amount paid for said clean up work from the contract price. Plaintiff claims this offset to be an unjustified offset because Defendant had told Plaintiff that it would have the clean up work performed at no cost to Plaintiff. (R. 94) Also during the course of performance of the Subcontract certain of Plaintiff's suppliers made demands on the Defendant for payment of Plaintiff's accounts. (T. 31, 32, 296, 297, 298, 299, 300) Defendant paid said accounts and offset the same from the contract price. Plaintiff also claims these payments to be an unjustified offset.

SECOND: Approximately two months after Plaintiff commenced performance of the Subcontract the Defendant, having reason to think that Plaintiff would not complete his performance, (T. 137, 138) went to Plaintiff and offered him a two thousand dollar ($2,000.00) bonus if he would satisfactorily complete his performance under the Subcontract. (T. 359) This offer of bonus and the terms thereof were set out in a letter from Defendant to Plaintiff dated November 15, 1968. (Pl. Ex. 7)

THIRD: During the course of performance of said Subcontract, certain change orders were instituted, which resulted in additional earth work to be performed by Plaintiff in the amount of nine thousand six hundred twenty four yards (9,624) greater than the contract estimate. (Pl. Ex. 27-(2)) The Subcontract estimated the earth work at fifty thousand nine hundred thirteen

DISPOSITION IN LOWER COURT

This case was tried to a jury in The First Judicial District Court of Cache County, the jury returned a general verdict in favor of the Plaintiff in the amount of Fifty-five hundred dollars ($5500.00) on Plaintiff's complaint. (R. 155) The jury also returned a general verdict on the Defendant's counterclaim in favor of the Plaintiff and denying Defendant recovery on its counterclaim. (R. 154) The Court entered judgment on the verdicts in favor of the Plaintiff on his complaint in the amount of Fifty-five hundred dollars ($5500.00) and denying Defendant recovery on its counterclaim, plus costs of Court in the amount of Seventy-eight dollars and sixty cents ($78.60), on the 6th day of March, 1970. (R. 156) The Court further entered an order denying the Defendant's Motion for a New Trial on the 8th day of May, 1970. (R. 165)

RELIEF SOUGHT ON APPEAL

The Appellant seeks a reversal of the trial court's judgment entered on the jury verdict March 6, 1970, and reversal of the trial court's order denying Defendant's Motion for a New Trial, for the reason that the evidence was insufficient to justify the verdicts of the jury and said verdicts were contrary to the law.

STATEMENT OF THE FACTS

Plaintiff and Defendant entered into a written Agreement of Subcontract on the 17th day of August, 1966, wherein the Defendant was the general contractor for an irrigation project sponsored by the Montpelier Irrigation Company of Bear Lake County, Idaho, and the Plaintiff as subcontractor was to perform certain work on said irrigation project. (Pl. Ex. 24) The Plaintiff's claims and Defendant's counterclaim arose out of transactions between Plaintiff and Defendant in the course of performance of said

prior thereto, pay all such claims for labor and materials and charge the amount to subcontratcor."

"In paragraph 6 of the Addendum Agreement the Plaintiff subcontractor agreed as follows:- "In the event the subcontractor fails or refuses to complete said project and agreement, contractor may hire any unfinished work; and materials furnished and completed and the cost thereby incurred, together with any sums owing on the advance made pursuant to this agreement, shall be paid by subcontractor to contractor on demand; and the amount expended by contractor to complete the project and the agreement shall bear interest from the date of said demand at the rate of seven per cent (7%) per annum".

The only instruction given by The Court which deals with offsets, directs the jury to determine the amount of monies not paid because of unjustified offsets. (see Instruction No. 20, R. 143) At no place is the jury instructed what is a justified offset. In this case the agreement of the parties controls when an offset against the contract price is justified. Paragraph 12 of the contract specifically permits an offset in the event of the failure of the subcontractor to pay for all materials and labor used in the prosecution of said work where the contractor has made said payment. A finding by the jury that the Doyle Anthony offset would not be allowed under paragraph 12 of the contract, would be clearly contrary to the evidence presented in this case. (See testimony of Doyle Anthony transcript p. 296-300) Paragraph 6 of the Addendum Agreement as set out in the proposed instruction No. 3 makes it clear that the Defendant could hire any unfinished work done and offset the costs to complete said work from the contract price. The reasonableness of the claimed offsets for unpaid bills has been upheld under general principles of law governing the availability

yards (50,913) and Plaintiff bid this at twenty cents (20c) per yard. (Pl. Ex. 24) The Plaintiff here contends that he should be compensated on the basis of a reasonable price per yard, which he contends is thirty-five cents (35c), (Pl. Ex. 27-(2)), for the additional earth work, rather than be compensated at the contract price of twenty cents (20c) per yard.

FOURTH: During the construction of the irrigation project, Defendant placed a number of structures and head gates in position in the canal bank before Plaintiff completed his earth work under the Subcontract. (T. 108, 109, 321-329) Plaintiff claims that said action on the part of the Defendant interfered with his machinery doing the earth work and claims damages therefore. (Pl. Ex. 27) Plaintiff testified that there was no prior agreement which controls, whether or not the structures could be placed in position before the earth work. (T. 108) An expert witness testified for the Defendant that the custom and practice in canal construction in reference to installing head gates and other structures, before the earth work is completed, is that it is done both before and after. (T. 183, 184) The Defendant contends that the element of time of completing the project required that the structures be placed in position ahead of the earth work. (T. 321-329)

ARGUMENT

POINT I

THE COURT ERRED IN REFUSING TO GIVE DEFENDANTS PROPOSED INSTRUCTION NO. 3.

The Defendant's proposed instruction No. 3 is as follows: "In paragraph 12 of the contract the Plaintiff subcontractor agreed as follows: In the event of the failure of the subcontractor during the progress of the work or any time thereafter, to pay for all materials and labor used in the prosecution of said work, the contractor may at his option, and without notice to the subcontractor

tion for the modification requiring Defendant to perform this work under the contract without charging the Plaintiff. In this case the lack of consideration to support this modification clearly required the court to direct the jury to the effect that this modification agreement was not enforceable under the law.

POINT III

THE JURY SHOULD HAVE BEEN INSTRUCTED THAT THE DEFENDANT'S AGREEMENT TO BONUS THE PLAINTIFF IF HE SATISFACTORILY COMPLETED HIS PERFORMANCE UNDER THE SUBCONTRACT WAS UNENFORCEABLE BECAUSE OF LACK OF CONSIDERATION.

As pointed out in the statement of facts, the Bonus Contract consisted of an agreement by the Defendant to pay Plaintiff a Two Thousand dollar bonus ($2,000.00) if he would satisfactorily complete his performance under the Subcontract. Essentially the Bonus Contract consisted of a promise to pay additional money to the Plaintiff if he would complete his required performance under the contract. This means that the Plaintiff was required to do no more than was originally required under the contract. The rule as to whether there is consideration for a promise of additional payment to complete the required performance under the contract is set out in the following statement from 13 Am. Jur. 2d 9, Building and Construction Contracts, Sec. 5: "According to the rule supported in most jurisdictions which have passed on the matter a promise by a contractor under a building and construction contract, to pay the Contractor compensation additional to that provided for in the contract for the performance of the contract is at least in th absence of any unforseen difficulties in performance, unenforceable because without consideration".

See in support of the above statement of the rule 12 ALR 2d 78 Consideration for Additional Payment; Straw v. Temple (1916)

of offsets. Also, the availability of offsets, for completion of the subcontractor's work after the subcontractor has failed to complete his work has been upheld under general principles of law governing availability of offsets. See 46 ALR 397; 13 Am. Jur. 2d 109, Building and Construction Contracts Sec. 119

From the above it is clear that the types of offsets which the Defendant was trying to make were justified as a matter of law, and by not instructing the jury on the legal matter of what offsets are justified the Court left this legal question to be determined by the jury.

POINT II

THE JURY SHOULD HAVE BEEN INSTRUCTED THAT THE DEFENDANT'S AGREEMENT TO HAVE THE CLEAN-UP WORK DONE BY ANOTHER SUBCONTRACTOR AT NO COST TO THE PLAINTIFF WAS UNENFORCEABLE BECAUSE OF LACK OF CONSIDERATION.

Paragraph 6 of Plaintiff's complaint alleges that the contractor agreed to have part of the subcontractor's performance performed by a third party without deducting the cost to have this work done from the total contract price. This modification of the contract terms which allows Plaintiff to do less work under the contract than required by the original contract agreement must be supported by consideration the same as any other modification of the contract's terms. The parties to this contract could modify or waive their rights under the contract the same as under any other contract. However, as in the case of other contracts the modification or waiver must be supported by consideration. The rule of law requiring consideration for a contract modification is so well established there can be no dispute about that requirement. 17 Am. Jur. 2d 936 Contracts Sec. 469. No evidence was introduced in this case which in any way would indicate that there was considera-

be completed to the satisfaction of the Project Engineer Mr. Whiting. It is also clear and uncontradicted from the testimony of Newell J. Olsen that when the Plaintiff left the job the clean-up work left to be done and the Agreement of Subcontract remained uncompleted. (T. 355, 356) The testimony of Mr. Olsen is equally clear that Defendant employed and paid another subcontractor to perform this clean-up work. (T. 357) The testimony of Mr. Philip Whiting, Project Engineer, which was presented in this case by way of deposition, makes it clear that the Project Engineer did not consider the job complete until the clean-up work was performed. (T. 281, 282) From this it is clear that the evidence does not support a finding by the jury that the terms of the contract requiring the Project Engineer's approval of completion of the project was performed.

POINT V

THE JURY SHOULD HAVE BEEN INSTRUCTED THAT THE ADDITIONAL EARTHWORK SHOULD HAVE BEEN COMPENSATED FOR AT THE CONTRACT PRICE OF TWENTY CENTS PER YARD (20c)

The question of whether the additional earth work performed by the Plaintiff should have been compensated for at the contract per unit price of twenty cents per yard (20c) or at a reasonable price per yard is controlled by the agreement of the parties. The agreement of the parties is determined first from the express writing of the contract and to assist in interpretation of the meaning of the written contract the custom of the trade is to be considered. Paragraph 5 of the subcontract specifically deals with changes required to be made and appears to deal with the price to be charged for such changes. Said paragraph is as follows:

> "5. The Subcontractor hereby agrees to make any and all changes furnish the materials and perform the work that the Contractor may require without nullifying this agreement, at a reasonable addition to or reduction from, the contract

48 Utah 258, 159 P. 44 Smith v. Brown (1917) 50 Utah 27, 165 P. 468.

The question of whether the Plaintiff's agreement to perform under the change orders is additional consideration is controlled by paragraph 5 of the subcontract which requires the subcontractor to perform such additions and changes it states as follows: "The Subcontractor hereby agrees to make any and all changes, furnish materials and perform the work that the Contractor may require without nullifying this Agreement at a reasonable addition to or reduction from the contract price hereinbefore named, and prorate to the same". (Emphasis Added)

It is clear from the above that the Court should have ruled as a matter of law that the Bonus Agreement was not supported by consideration.

POINT IV

A FINDING BY THE JURY OF PERFORMANCE OF THE TERMS OF THE BONUS AGREEMENT BY THE PLAINTIFF IS NOT SUPPORTED BY THE EVIDENCE.

Defendant's Agreement to bonus the Plaintiff if he would complete his performance, and the terms thereof, are contained in a letter of November 15, 1966 from Defendant to the Plaintiff. That letter was introduced into evidence as Pl. Ex. 7. The pertinent parts of said letter are as follows:

"I have discussed this matter with my firm and we have come up with the following proposals:

> "1. We believe you should continue on the Canal without delay and that you should complete it at the earliest possible time. When this is complete and the floodway is complete as far as you have gone with it, we will bonus you two thousand dollars ($2,000.00) we will require a letter stating it is complete signed by Mr. Whiting".

It appears that an important part of the Bonus Agreement was that the Plaintiff's performance under the subcontract was to

Defendant's conduct in placing the structures ahead of the earthwork was negligent. The court clearly did not give any instructions to the jury on negligence. If the Defendant is to recover on the claimed interference, it must be on the basis of a breach of contract by the Defendant. It is clear from the Plaintiff's own testimony that there was no prior understanding between the parties whether the structures would go in before or after the earthwork. On page 108 of the transcript, the Plaintiff testified as follows:

"Q. Mr. Telford, when you bid this job did you learn enywhere either through information provided you orally through Mr. Olsen, or from the plans and specifications as to when the structures were to be placed in the canal bank?

"A. No.

"Q. Did you ever find out whether there was anything in the plans and specifications requiring such installation either before or after the earthwork?

"A. There wasn't".

Since there was no prior agreement between the parties, it would appear that the reasonableness of the action of the Defendant, placing structures ahead of the earthwork should be controlling. The reasonableness of such action should be controlled by first, the custom of the trade, and second, by the Defendant's reasons for placing the structures ahead of the earthwork. There seems to be little or no doubt as to what the custom of the trade requires. One expert witness who has had considerable experience in all phases of canal construction testified at page 183 and 184 of the transcript as follows:

"Q. In your canal work have you ever formulated an opinion as to what the custom and practice is in the canal construction work in reference to installing head gates and other structures in head of the contractor doing the earthwork. In other words, could you tell us what is the general practice in going ahead of the earthwork in constructing . . .

"A. Well, it's done both ways.

price hereinbefore named and prorate to the same. (Emphasis Added)"

From this section of the contract it appears that the words "and prorate to the same" means that the contract requires that additions to the contract required by change orders under paragraph 5 of the contract are required to be performed at the contract price.

A second factor about the written contract which would indicate that the additional earthwork was to be compensated for at the bid price is that in paragraph 2 of the contract which sets out the items covered by the Subcontract a unit price is set out for the earthwork. This appears to be a unit bid. The use of unit bids in contracting earthwork was explained by an expert witness for the Defendant. (T. 187, 188) The expert witness stated that the quantity figure was an engineering estimate only and that the normal practice under government contracts is that unless the quantity runs substantially greater than the engineering estimate, additional compensation is not allowed.

From the above it is clear that a finding that the additional earthwork should have been compensated at the contract price is the only finding consistent with the evidence and the court should have so instructed the jury as a matter of law.

POINT VI

THE EVIDENCE DOES NOT SUPPORT A FINDING BY THE JURY THAT THE AGREEMENT OF THE PARTIES REQUIRED THE STRUCTURES TO BE PLACED IN POSITION AFTER THE EARTH WORK WAS COMPLETED.

The recovery of damages by Plaintiff for the delay of Plaintiff's equipment, resulting from Defendant placing the structures in position in the canal bank before Plaintiff had a chance to complete his earthwork is controlled by the Agreement of the Parties. There appears to be no contention in this case that the

or collusion on the part of the subcontractor, then the time herein fixed for the completion of the work shall be extended the number of days that said subcontractor has thus been delayed, but no allowance or extension shall be made unless a claim therefore is presented in writing to the contractor within forty-eight hours of the commencement of such delay."

The notice provisions of the above clause is a condition subsequent to bringing an action based on such delay. The reason for this notice provision is to allow the contractor to remedy the cause of the delay. There was no evidence presented in this case that the required written notice was given.

POINT VIII

THE CONTRACT DENIES RECOVERY OF DAMAGES FOR DELAY.

Paragraph 4 of Section 3 of the contract provides as follows: "In the absence of breach of contract by the contractor or owner no claims for additional compensation or damages for delay will be allowed by the contractor and said extension of time for the completion shall be the sole remedy of the subcontractor, provided however, that in the event and in such event only, the contractor obtains additional compensation from the owner on account of such delays and then and in that event, subcontractor shall be entitled to such portion of such additional compensation so received by the contractor from the owner as is equitable under all the circumstances. (Emphasis Added)"

From the above provision it is very clear that the contract remedy of additional time is the exclusive remedy granted for delay and that an action cannot be brought for damages resulting from said delay. As pointed out under point 6 above, this Defendant was not in breach of contract, because placing the structures ahead of the earthwork was reasonable.

POINT IX

THE GENERAL VERDICT OF THE JURY REQUIRES REVSERSAL AND REMANDING OF THE CASE FOR A NEW TRIAL IF ANYONE OF THE ABOVE POINTS ARE GROUNDS FOR A REVERSAL.

In rendering a general verdict it is not possible to determine

"Q. Have you seen it done both ways in your experience.

"A. Yes, we've done it both ways."

Mr. Philip Whiting, the Project Engineer testified in the transcript at page 272, as follows:

"Q. From your experience as an engineer is this an unusual procedure to place the structure ahead of the bank.
Mr. Daines: I am not clear what you mean.

"Q. Well ahead of the contractor that's building the bank, place the structures in before the bank is built.

"A. It's been done both ways. I would say probably more from what I have observed or been around most of the time, the canal banks are built first, but it has been done both ways."

From the above it is clear that the practice in the trade is to put the structures in both before and after the earthwork. The Defendant claims that the factor of time of completion of the project required the Defendant to place the structures ahead of the earthwork. (T. 326) It would appear that this reason would sustain the reasonableness of the placing of the structures in position ahead of the earthwork. From the above it is clear that the evidence will not support a finding that the actions of the Defendant placing the structures ahead of the earthwork was unreasonable.

POINT VII

THE JURY SHOULD HAVE BEEN INSTRUCTED THAT THE CONTRACT REQUIRED THE PLAINTIFF TO GIVE THE DEFENDANT FORTY-EIGHT HOURS WRITTEN NOTICE OF THE INTERFERENCE.

Paragraph 2 of Section 3 of the contract states as follows: "Should the subcontractor be delayed in the prosecution or completion of the work by the act, neglect or default of the owner, of the engineer, or of the contractor, or should the subcontractor be delayed for waiting for materials, if required by this contract to be furnished by the owner or contractor, or by damage caused by fire or other casualty for which the subcontractor is not responsible, or by combined action of the workmen, in no wise caused by or resulting from default

which causes of action are the basis for the verdict of fifty-five hundred dollars ($5,500.00) Thus if the recovery could not be had on anyone of the causes of action, it will be necessary to determine which causes of action relief has been granted on. See O'Brien v. Wallace 359 P. 2d 1029, 145 Colo. 291.

SUMMARY

It is respectfully submitted to the court that the verdict of the jury was contrary to the facts and the law and that this court should enter an order reversing the trial's court's judgment and remanding the case for a new trial.

Respectfully submitted by

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