10-31-2012

American Bank v. Wadsworth Golf Construction Co Respondent's Cross Appellant's Reply Brief Dckt. 39415

IN THE SUPREME COURT OF THE STATE OF IDAHO

AMERICAN BANK,

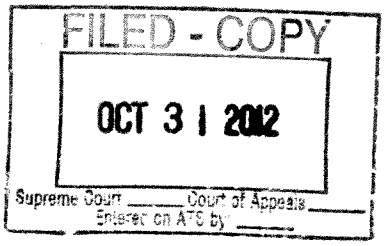
Plaintiff, Cross-Defendant,
Appellant, Cross-Respondent,

vs.

WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST,

Defendant, Cross-Claimant,
Respondent, Cross-Appellant.

SUPREME COURT NO. 39415-2011



RESPONDENT-CROSS-APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Kootenai

Honorable John P. Luster presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

All the issues raised in American Bank's Opening Brief have been fully briefed and argued. This brief is limited to the issues raised in the cross-appeal of Wadsworth Golf Construction Company of the Southwest ("Wadsworth").

In American Bank's Cross-Respondent's Brief American Bank argues: "Wadsworth should not be granted a windfall of $2,425,483.00 simply because American Bank posted the Lien Release Bond." (Brief, p. 2). What this argument omits is any mention of the windfall that American Bank would receive if this Court were to adopt positions taken by American Bank.

American Bank knew that it was lending money to BRN Development ("BRN") for the purposes of the construction of the golf course and improvements for what was commonly referred to as the Black Rock North Development. Recitals "A" and "B" of the Revolving Credit Agreement entered into between American Bank as lender and BRN as borrower (Exhibit 38, p. 1) provided:

> A. Borrower owns certain real property located in Kootenai County, Idaho commonly referred to as the "Black Rock North" development. Borrower is developing the real property by, among other things, the construction of a golf course and equestrian facility and related improvements and the subdivision of the property for the sale of residential parcels.
>
> B. Borrower has requested that Lender make available to Borrower an extension of credit and to advance from time to time funds for the construction of improvements and the development of the real property in the ordinary course of Borrower's business.

The entire development consisted of approximately one thousand acres. The golf course traverses throughout the project and consist of approximately two hundred acres. R. Vol. 13, p. 3211.

Wadsworth substantially completed construction of the golf course on October 20, 2008, with final completion occurring on November 21, 2008. R. Vol. 13, p. 3217. The District Court found that the golf course benefits the entire one thousand acre project. R. Vol. 13, p. 3232.

On May 19, 2011, American Bank purchased the entire one thousand acre parcel at the foreclosure sale for a credit bid of $18,682,767.78. R. Vol.13, p. 3211.

Between American Bank and Wadsworth one of the two entities will suffer what will appear to them to be an approximate 2.4 million dollar loss. If the loss is to be suffered by Wadsworth, American Bank will have received the property with a fully constructed high end Tom Weiskopf designed golf course without having the general contractor, being Wadsworth, paid in full. If the decision of the District Court is affirmed by this Court Wadsworth will merely be receiving payment for its work, labor, and materials. American Bank desired to have the Wadsworth lien removed so that it could deal with its interest in the property free of the lien. It did so and apparently sold a substantial interest in the project to Fidelity National Timber Resources. American Bank got what it wanted and if it escapes from paying Wadsworth the balance owing under the construction contract, American Bank will have received a windfall. If Wadsworth prevails in this appeal, it will not receive a windfall but merely receive payment for the services, labor, and material that it provided which now is to the benefit of American Bank.

II. ARGUMENT

1. The District Court Erred in Finding That Wadsworth Waived its Lien Rights for Retainage.

The final contract between Wadsworth and BRN is set forth as American Bank Exhibit 1 and Wadsworth Exhibit D. The two exhibits differ in that the Wadsworth Exhibit has attached to it more exhibits and addendums than the American Bank exhibit. The American Bank exhibit consist of thirty-five (36 pages if the Capps January 27, 2007 letter is included) and the

Wadsworth exhibit consist of one hundred eight pages, which includes a copy of the Capps letter. Excluding the Capps letter the first thirty-five pages of the Wadsworth exhibit are identical to the first thirty-five pages of the American Bank exhibit.

The District Court found that under the contract Wadsworth was obligated to use the BRN prepared lien release form. R. Vol. 13, p. 3241. That, however, is not what the contract provided. Page four of the general conditions, (Exhibit 1, p. 5; Exhibit D, p. 4) stated:

> Subcontractor shall submit original payment applications to Owner by the 25th of the month (faxed payment applications are not acceptable). Should the 25th fall on a weekend, all payments applications shall be submitted on the Friday before. Payments shall be deposited, postage prepaid, return receipt requested, in the regular United States Mail. **As a prerequisite for any payment, Subcontractor shall provide, in a form satisfactory to Owner, partial lien releases, claim waivers, and affidavits of payment from Subcontractor, and its subcontractors and suppliers of any tier, for the billed portion of Subcontractor's work.** (Emphasis added).

In the final contract BRN is referred to as the owner and Wadsworth is referred to as the subcontractor.

The contract did have various exhibits attached to it and incorporated by reference. (Exhibit 1, p. 3; Exhibit D, p. 2). One of the exhibits, attached as Exhibit B was the BRN Lien Release Form, identified in the contract as a "interim lien/claim waiver" and on the document itself entitled "Conditional Lien Waiver, Release and Subordination." (Exhibit 1, p. 22; Exhibit D, p. 21).

Wadsworth submits that the attaching of the BRN prepared lien release form to the contract did not change the contractual provision that Wadsworth was to submit to BRN, in a form satisfactory to BRN, partial lien releases, claim waivers, and affidavits of payment. The exhibit to the contract is merely an example of a form acceptable to BRN.

As set forth in Wadsworth's initial brief, Wadsworth would generally submit its own prepared lien release form developed pursuant to Arizona Revised Statute Section 33-10008. The only times that a BRN prepared lien release form was used was when the Wadsworth payment application either did not include the Wadsworth prepared lien release form with the application, when BRN was proposing to pay an amount different than the amount set forth in the Wadsworth lien release form, or when on that one occasion, the Wadsworth prepared lien release form mistakenly identified the name of the project. Tr., pp. 288-289.

BRN made full payment of eleven Wadsworth payment applications accompanied by a Wadsworth prepared lien release form, and made a partial payment on a twelfth application accompanied by the Wadsworth prepared lien release form. The District Court remarked that it was obvious that BRN accepted the Wadsworth prepared lien release form. Tr. p. 341. BRN never voiced any objection to Wadsworth's use of its lien release form. Tr. p. 239.

Mr. Harrell, the President of Wadsworth, testified that it was his understanding that the Wadsworth prepared lien release form did not waive or release any rights to retainage or rights to lien for retainage. Tr. p. 239. On those limited occasions when Mr. Harrell executed a BRN prepared lien release form he did not understand that there was any difference between the two forms. Tr. pp. 288-289; 313-314; 237-239; 242-243. When signing the BRN prepared lien release form, Mr. Harrell understood the form to have the same legal effect as the Wadsworth prepared form, and would not effect any of the rights pertaining to retainage. Tr. pp. 237-239, 242-243.

Mr. Kyle Capps, the project manager for BRN, testified that he did not know the true meaning or purpose of the BRN prepared lien release form. Tr. p. 344. As Mr. Capps did not

know the meaning of the BRN prepared lien release form, he presumably would not know the difference between the two forms.

Prior to the preparation of a trial transcript, the District Court, in its memorandum decision, wrote: "Mr. Capps testified that Wadsworth was contractually obligated to execute and deliver a Golden Release (BRN prepared lien release form) with each payment application that Wadsworth submitted to BRN Development and that by doing so Wadsworth was bound by the language contained in such Golden Release." Tr. p. 3239. Mr. Capps, however, only testified that he merely expected that Wadsworth would utilize the BRN lien release form attached to the contract but not necessarily that Wadsworth was contractually obligated to do so. Mr. Capps testified as follows:

> Q. And yesterday, Mr. Harrell testified that in every application that Wadsworth would initially submit to BRN, it was either accompanied by a Wadsworth prepared lien release or on occasion Wadsworth neglected to include their lien release. Is that a fair statement based on your recollection"?
>
> A. I'm not -- I don't recall specifically which lien releases were attached. I know our contract had a specific lien release that our group had produced with the contract that we expected to be included.
>
> But I think, as I testified in my deposition, I typically reviewed the content and the billing amounts for the contract items, and more often than not, it was our accounting or control department that would deal with the lien release and follow up and make sure the lien release was included and signed.
>
> Q. But the initial application, wouldn't that go first to your attention when it came in?
>
> A. Yes. Yes.

Q. And you would check to see if there was a lien release attached to it?

A. Normally, yes. But after this last year, I found that I wasn't thorough enough in making sure the lien releases were attached to those. I counted on our accounting department to deal with the lien releases, because their policy was they would not issue a check without a lien release.

Q. And is it your recollection that on occasion a Black Rock North prepared lien release was utilized.

A. Yes.

Q. And, conversely, a number of times, the Wadsworth lien release form was utilized. Do you recall that?

A. Yes.

Q. And do you have any recollection as to why on occasion the Black Rock lien release form was used?

A. Again, that was -- the contract document would have expected us to have each time, but I'm sure that every time a lien release was not received with application of payment, the accounting department would send one out requiring it to be signed before payment was issued.

Q. And we also had some testimony that there were some times when Black Rock North proposed or BRN Development proposed to pay an amount less than the application. One example was there's an application for about roughly a million two and BRN Development proposed to pay only a million of that. Do you recall that occasion?

A. I recall that, yeah.

Q. And we've had testimony that Wadsworth had submitted a lien release in the original application

amount, and when BRN decided to pay a lesser amount, it generated its lien release to coincide with the amount of the payment. Do you recall that?

A. I don't know about that. I wasn't involved in the preparation of that document.

Q. But it was your understanding that BRN needed a lien release that matched the amount of the payment?

A. Correct.

Q. Okay. Did anyone at BRN Development ever tell you that they were concerned about the difference between the one form of lien release and the other?

A. Not that I recall, no. Tr. pp. 337-340.

In addition, Mr. Capps testified as follows:

Q. And then the testimony is that from approximately October through January of 2006, the final form contract was negotiated. Is that consistent with your recollection?

A. Yes.

Q. And that there ultimately was a final contract executed. Is that also consistent with your recollection?

A. Yes.

Q. Now, was it your understanding that the contract required BRN -- I'm sorry -- required Wadsworth to submit a lien waiver to obtain a progress payment?

A. Yes.

Q. And was it your understanding that the written contract actually had a lien waiver that was acceptable to BRN?

A. Correct. Yes.

Q. Was that the lien waiver that you expected Wadsworth to submit with its payment applications?

A. Yes.

Q. And did you rely upon Wadsworth to actually do that, submit the payment application with that particular lien release?

A. Yes. I expected that to be the one attached to -- I think I previously testified I didn't specifically review the lien release each time. I kind of counted on my accounting department to make sure that got covered.

Q. The actual contract that's been admitted into evidence is 115 pages. Did you remember every little detail of the contract as you were out there working on this particular job?

A. No.

Q. Is that why you were relying upon Wadsworth to comply with its contractual obligations?

A. Yes.

Q. And I think you testified that the actual lien waiver that was acceptable to BRN and attached to the contract was actually drafted by somebody else. Correct?

A. Yes.

Q. Was it drafted by BRN's attorney?

A. I assume so, yeah. That's where the contract came to me from. Tr. p. 352-353.

A. Lack of Consideration.

In its memorandum decision, the District Court correctly held that an express waiver of a materialman's lien must be supported by consideration in order to be effective and binding, citing

Pierson v. Sewell, 97 Idaho 38, 539 P.2d 590 (1975. R. Vol. 13, p. 3239. The doing of something which one is already bound by contract to do is not a valid consideration. As stated by the Court in *Louk v. Patten*, 58 Idaho 334, 73 P.2d 949, at 951 (1937): "A promise to do what the promisor is already bound to do cannot be consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal." In its memorandum decision, the District Court correctly *Beebe Construction Corp v. Circle R Co.*, 10 Ohio App.2d 127, 226 N.E.2d 573, at 576 (1967) for the proposition that: "A waiver of a mechanic's lien in consideration of payments made by an owner or contractor, which he is legally bound to pay to the claimant, does not constitute valuable consideration so as to make the lien waiver effective and binding." Likewise, in *Sussel Co. v. First Federal Savings and Loan Association of St. Paul*, 304 Minn. 433, 232 N.W. 2d 88 (1975) the Court found that a lien waiver given in connection with a contractually obligated progress payment merely constituted a waiver of lien rights to the date of the payment but did not include a waiver of future lien rights and lien priorities as no additional consideration beyond that which was owing was paid. Like the case at hand, the Court in *Sussel* found valid consideration for a lien waiver to the extent of the amount of the progress payment, but no consideration to the extent that the waiver purported to waive additional lien rights.

While the District Court correctly articulated the law of consideration as it relates to lien waivers, the Court rejected Wadsworth's argument that there was lack of consideration to construe the BRN prepared lien waivers as waiving anything beyond any right to file a lien based upon the amount of the payment, on the basis of the parties' stipulated findings of fact and on the basis that the Court construed the BRN-Wadsworth contract as requiring the use of the BRN prepared lien waiver form.

Paragraph ten (10) of the parties' stipulated findings of fact provided as follows:

> Wadsworth submitted six (6) Golden Lien Releases to BRN. The six (6) Golden Lien Releases shall be admitted as Plaintiff's Trial Exhibit Nos. 29-34. Wadsworth received full consideration for each of the six (6) Golden Lien Releases that Wadsworth submitted to BRN. **More specifically, for each of the six (6) Golden Lien Releases that Wadsworth submitted to BRN, BRN paid to Wadsworth the dollar sum that is referenced in each of the six (6) Golden Lien Releases.** The date of the last Golden Lien Release is March 19, 2008. The last Golden Lien Release shall be admitted as Plaintiff's Trial Exhibit No. 34. R. Vol. 12, p. 3009. (Emphasis Added).

Wadsworth contends that what it stipulated to was that for each of those BRN prepared lien releases, BRN paid to Wadsworth the dollar sum that is referenced in each. Wadsworth was only acknowledging that it had received the amount of the payment set forth in the release and that it was waiving any right to file a lien based upon the amount of that payment. Wadsworth was not acknowledging that it had received any consideration for subordinating its lien priority or waiving its right to lien for unpaid retainage.

If the contract between BRN and Wadsworth had specifically required Wadsworth to use the BRN prepared lien release form, the District Court would have been correct in finding that the contract provided consideration for the use of the lien release form. However, as set forth above, Wadsworth contends that the contract did not obligate Wadsworth to use the BRN prepared lien release form, but only required Wadsworth to utilize a form satisfactory to BRN. As stated above, BRN made full payment of eleven Wadsworth payment applications accompanied by a Wadsworth prepared lien release form, and a partial payment on a twelfth application accompanied by that form. It was obvious to the District Court that BRN accepted the use of the Wadsworth prepared lien release form.

There is no argument that Wadsworth ever received anything in addition to the amount of its payment application. Under the contract, Wadsworth was to be paid ninety-five percent of its progress payment applications with five percent being held by BRN as retainage, payable upon completion of the project. The amount of unpaid retainage that had accrued up to the effective date of the last BRN prepared lien release form executed by Wadsworth was $257,043.00. R. Vol. 12 p. 3009. There is simply no consideration for Wadsworth to waive its right to lien for retainage in the event that it was not paid.

The District Court found that not only had Wadsworth waived its right to lien for the $247,043.00 in retainage owing as of March 19, 2008, being the date of the last executed BRN prepared lien release form, that Wadsworth further should be deemed to have waived the right to lien for an additional $86,942.00, for a total of $343,985.00, on the basis that Wadsworth's payment application number twenty, covering Wadsworth's work up through July 31, 2008, while accompanied by a Wadsworth lien release form, should have been accompanied by a BRN prepared lien release form which, under the District Court's analysis, would have waived the additional $86,942.00.

On the basis of the foregoing, Wadsworth respectfully submits that the District Court committed error in these rulings.

B. Waiver.

American Bank argues that by mistakenly executing six BRN prepared lien release forms, Wadsworth has waived the right to lien for unpaid retainage. A waiver is a voluntary, intentional relinquishment of a known right. *Frontier Federal Savings Loan Association v. Douglas*, 123 Idaho 808, at 812, 853 P.2d 553 (1993). As stated by the Court in *Seaport Citizens Bank v. Dippel,* 112 Idaho 736, at 739, 735 P.2d 1047 (Ct. App. 1987), "Waiver is foremost a question of intent. To establish a waiver, the intent to waive must clearly appear." In *Straub v.*

Smith, 145 Idaho 65, 175 P.3d 754 (2007) the issue before this Court was whether a party voluntarily gave up their right to seek an award of attorney's fees and costs by agreeing to a stipulation for dismissal. This Court found that there was no waiver and stated:

> Neither the motion to dismiss nor the stipulation mentions costs or fees. Since in this case the Smiths were unaware that stipulating to dismissal of the case also meant that they were agreeing not to pursue costs or fees, there was no voluntary intentional relinquishment of a known right. At 145 Idaho 69.

In *C S & W Contractors, Inc. v. Southwest Savings & Loan Association,* 175 Ariz. 55, 852 P.2d 1239 (1992), partially vacated on other grounds at 180 Ariz. 167, 883 P.2d 404 (1994) the question before the Court was whether certain lien waivers were full and final lien releases, or only partial releases as to the extent of the payment received. The Court found that the waivers were partial waivers limited to the amount of payment and stated:

> In addition, over Southwest's objection, CS & W's president testified that his intent in signing the forms was "[t]o generate a partial waiver of lien for the amount of payment," that he had no discussion with Sencorp that the waivers were to be construed as full and final lien releases, and that the custom and practice in the industry was to sign partial waivers of liens when periodic payments were made.
>
> Southwest contends that the court improperly permitted CS & W to introduce evidence of the parties' intent in executing the forms. We disagree. In *Collins v. Collins,* 46 Ariz. 485, 499, 52 P.2d 1169, 1174 (1935), our supreme court noted that "it is almost universally held that as between a third party and one of the parties to the contract it may always be proven by parol evidence that a contract between them is different from what it purports to be on its face." At 852 P.2nd 1243. (Some citations deleted).

No Wadsworth payment application was initially accompanied by a BRN lien release form. The only times that the BRN form were used was when BRN proposed to pay an amount lesser than the Wadsworth payment application and the Wadsworth prepared lien release form setting forth the amount of the application, or when Wadsworth neglected to submit its form with

the application, or on the one occasion when the Wadsworth form misidentified the name of the project. In those circumstances, BRN would then prepare its form and transmit it by facsimile to Wadsworth. Stephen Harrell, the President of Wadsworth, would then either sign the BRN prepared lien release form or authorize other Wadsworth employees to execute the form, and transmit it back to BRN. In one of the more significant ironies of this case, at no time did Mr. Harrell understand that the BRN prepare lien release form may have a legal effect different then the Wadsworth prepared form. Kyle Capps, the project manager for BRN, testified that he did not understand the legal meaning of the BRN prepared form, in that it was prepared by the BRN's attorneys, but he understood that to authorize a progress payment to Wadsworth he needed some lien release form that matched the dollar amount of the actual amount of the payment. Tr. p. 344, 353, 339. From this it is clear that Wadsworth never voluntarily and intentionally waived its rights to lien for unpaid retainage.

The District Court found that Mr. Harrell's testimony about his understanding of the meaning or legal affect of the BRN lien release form was irrelevant as to the meaning of the BRN lien release form. R. Vol. 13 p. 3239. That, however, is not the purpose of the testimony. The purpose of the testimony is to establish that while the BRN lien release form may, on its face, be construed to mean X, at all times Mr. Harrell believed that the form meant Y, and that Mr. Harrell believed that the BRN lien release form meant something different than what may be purported on its face. This testimony does not contradict the words of the BRN lien release form but rather establishes that through its mistaken execution by Wadsworth, Wadsworth never voluntarily intentionally relinquished its right to lien for unpaid retainage.

2. Attorney Fees.

The District Court awarded Wadsworth 79.2% of the amount that it sought in this action and on that basis awarded Wadsworth 79.2% of its claimed attorney fees and costs. In the event that this Court were to award Wadsworth an amount in excess of the amount awarded by the District Court by reason of its cross appeal, Wadsworth respectfully submits that the award of attorney's fees at the District Court should be proportionately increased. American Bank does not appear to challenge this proposition.

In addition, Wadsworth seeks an award of attorney's fees and costs on appeal pursuant to Idaho Code § 45-513, § 45-522, I.R.C.P. 54(c)1, and I.A.R. 41. American Bank does not appear to contest these propositions but instead argues that the issues of attorney's fees both at the trial court level and on appeal should be based upon this Court's determination of the underlying issues.

III. CONCLUSION

Wadsworth has previously submitted that the District Court's rulings in its favor should be affirmed on appeal. Furthermore, Wadsworth submits that the District Court did commit error in finding that Wadsworth waived its right to lien for unpaid retainage in the amount of $257,043.00 to the last effective date of a BRN lien release form, together with an additional $86,942.00 to the last Wadsworth payment application. As attorney's fees, costs, and interest were awarded to Wadsworth by the District Court on the percentage basis of Wadsworth's recovery as compared to the amount of its claim, those awards should likewise be adjusted on a proportionate basis in the event that this Court awards to Wadsworth the right to recover its earned retainage. Lastly, Wadsworth respectively submits that it is entitled to an award of its attorney's fees and costs on appeal.

RESPECTIVLY SUBMITTED this 30th day of October, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of October, 2012, I caused a true and correct copy of the foregoing **RESPONDENT-CROSS-APPELLANT'S REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

C. Clayton Gill
Moffatt, Thomas, Barrett, Rock & Fields
101 S. Capitol Blvd., 10th Floor
Boise, ID 83701

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
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