99 Ct.Cl. 435
United States Court of Claims

NILS P. SEVERIN, AS SURVIVING PARTNER OF NILS P. SEVERIN AND ALFRED N. SEVERIN (NOW DECEASED), FORMERLY CO-PARTNERS TRADING UNDER THE STYLE OF N. P. SEVERIN COMPANY
v.
THE UNITED STATES

No. 43421
|
May 3, 1943 *

* Petition for writ of certiorari pending.

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On the Proofs

West Headnotes (3)

[1] **Assignments**
Nature of right to assign

United States
Assignments prohibited in general

If subcontractor did have a claim against the Government, he could not transfer that claim to the prime contractor, since assignment of such claims is forbidden by statute; section 3477, Revised Statutes, 31 U.S.C.A. § 203. Spofford v. Kirk, 97 U.S. 484, 24 L.Ed. 1032, cited.

62 Cases that cite this headnote

[2] **Contracts**
Nature and Form of Remedy

Public Contracts
Breach of contract in general

United States
Breach of contract in general

Breach of contract, if the contract be between private parties, might give rise to suit and recovery of nominal damages, even if no actual damages resulted from the breach; but the futile exercise of suing merely to win a suit was not consented to by the United States when it gave its consent to be sued for its breaches of contract. Nortz v. United States, 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907, 95 A.L.R. 1346; Great Lakes Construction Co. v. United States, 95 Ct.Cl. 479.

23 Cases that cite this headnote

[3] **Contracts**
Plaintiffs in general

Public Contracts
Delay of government and liability for damages

Public Contracts
Breach of contract in general

Where plaintiff, a contractor with the Government, sues for damages sustained by contractor as a result of the Government's breach of contract and also for damages sustained by another person, a subcontractor, who in his contract with plaintiff had absolved plaintiff from any liability to him for delays caused by the Government, recovery may be had only for the loss proved to have been incurred by contractor. Herfurth v. United States, 89 Ct.Cl. 122, cited.

88 Cases that cite this headnote

****1** *The Reporter's* statement of the case:

Attorneys and Law Firms

Mr. Herman J. Galloway for the plaintiff. *Mr. Bynum E. Hinton* was on the briefs.

Mr. Newell A. Clapp, with whom was *Mr. Assistant Attorney General Francis M. Shea,* for the defendant. *Mr. Currell Vance* was on the brief.

The court made special findings of fact as follows:

1. Nils P. Severin and Alfred N. Severin, during all the ***436** times material herein, were citizens of the United States and residents of the State of Illinois, and copartners

doing business under the name and style of N. P. Severin Company. On July 8, 1941, Alfred N. Severin died testate and on August 18, 1941, Continental Illinois National Bank and Trust Company of Chicago, was duly appointed the executor of his will. Since July 8, 1941, Nils P. Severin has been and is now the surviving partner of the former copartnership, and as such entitled to prosecute the claims of the former partnership.

The plaintiff and the former copartnership are referred to herein as plaintiffs.

2. Plaintiffs entered into a contract with the United States August 3, 1932, to furnish all labor and materials, and perform all work required for "the construction, including approaches, etc., of the Post Office at Rochester, New York, per Bid No. 4 (using sandstone for all exterior stone work except where marble and granite are required and substituting steel casement windows for the aluminum casement windows)" for a consideration of $805,923.00, in accordance with designated drawings and specifications. The work was agreed to be completed within 540 calendar days after the date of receipt of notice to proceed. The officer contracting for the United States was Ferry K. Heath, Assistant Secretary of the Treasury. Article 18 (b) of the contract read: "The term 'contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative."

Notice to proceed with the work was received by plaintiffs September 2, 1932, thus fixing the date for completion on or before February 24, 1934.

The specifications provided that the term "architect" as used therein should refer to Gordon & Kaelbar who by contract with the United States were "authorized to prepare all drawings and specifications and full-size details, pass on all shop drawings, approve or reject architectural samples as listed herein, criticize and approve plaster models or ornamental work as shown or noted on contract drawings."

Article 30 of the specifications provided: "The Supervising Architect is the duly authorized representative of the Contracting Officer."

***437** With reference to models the specifications provided:

46. MODELS.-The Government will furnish the models indicated on the drawings. Any additional models of rights, lefts, miters, etc., and any patterns required shall be provided by the contractor.

****2** 47. Models will be delivered F. O. B. at points designated by the contractor who shall furnish the Supervising Architect with full shipping directions. The Government bill of lading will be sent to the consignee who shall fill out the "Certificate of Delivery" and surrender the Government bill of lading to the carrier as payment for the shipping charges. The contractor or his authorized agent shall receive the models, be responsible for all charges for storage, etc., after notification that the models have been shipped, and for the care of the models from the time of delivery to him.

48. The models shall be unpacked immediately and examined. Dimensions shall be verified and any discrepancies or damage shall be reported in writing to the Supervising Architect. No repairs or alterations shall be made without written instructions from the Supervising Architect.

49. The contractor shall deliver such models at the building for verification of the work executed therefrom when so directed by the Supervising Architect. After completion of the contract the models are to be destroyed, unless permission is obtained from the Supervising Architect to dispose of them otherwise.

A copy of the contract and specifications is filed in evidence and made a part hereof by reference.

3. Work on the contract proceeded and was completed by the contractors and accepted by the Government on or about March 28, 1934, without imposition of liquidated damages for any delay upon the part of the contractors.

Upon completion of the work plaintiffs presented claims to the Supervising Architect or his successor in office for alleged losses due to delay in delivery of models affecting exterior marble column caps. All the claims so presented were considered and denied.

January 26, 1934, the acting Supervising Architect of the Treasury Department transmitted to plaintiffs the following findings of fact made by him:

***438** Reference is made to your letter of December 4, 1933, stating that you were delayed 8 weeks in connection with the delivery of models Nos. 6 and 7 affecting the exterior marble column caps at the Rochester, N. Y., Post Office.

There was some delay in awarding the model contract due to the fact that all of the bidders under the original bidding resided in cities some distance from Rochester, making it difficult for the Architects to inspect the modeling. New bids were obtained and the contract was awarded on January 14, 1933. Model No. 7 as originally designed represented an eagle and when the photographs were sent to this office for approval it was apparent that the eagle as designed would not be satisfactory as it assumed a very strained position with its wings wrapped around the curve of the column. The Architect was therefore instructed to furnish a new motif, entirely eliminating the eagle, for the column caps. The change in model No. 7 also involved model No. 6 and it was therefore necessary that both models be held up pending the submission of a new design by the Architects. Considerable correspondence took place on this subject and it was not until May 10 that the modeler's bid was accepted for the changed designed. The work was expedited as much as possible and a telegram was sent the Architects on June 17 approving the new models and authorizing shipment. The models were shipped on June 20 and the Engineer's reports show that the finished marble caps were received and set by you on August 17.

****3** While you advised several times in the period before you received the marble caps that you were being delayed, the Engineer's reports do not indicate that the delay reached the extent of 8 weeks. Inasmuch as the portico was of wall bearing masonry construction and the completion of the major portion of the building was not dependent on the portico, the Engineer reported that the actual delay connected with these marble caps amounted to 3 weeks. He cited the fact that after the column caps were set in place you allowed considerable time to elapse before starting the finish work in the vestibule. In view of these circumstances you are entitled to twenty-one (21) additional days, due to the delay connected with models 6 and 7, due note of which will be made at time of final settlement.

***439** Article 9 of the contract provided as follows with reference to delays:

Article 9. Delays-Damages.-If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. *** *Provided,* That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors due to such causes: *Provided further,* That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

4. The models referred to in the findings of fact by the acting Supervising Architect were necessary to the carving of exterior marble column caps at two entrances to the building, at which were porticos, the roof thereto being supported by columns, the caps of which were between column and frieze. The delay materially affected work confined to those particular areas and delayed completion of the building as an entirety. The delay was not justified and was a breach of the contract.

By reason of stoppage of work at the porticos, occasioned as found by the acting Supervising Architect, the following losses were sustained:

(a) Sub-contractor's field costs, including labor and rental of equipment.....	$702.00

(b) Sub-contractor's general overhead.....	35.10
(c) Plaintiffs' general overhead.....	73.71
	810.81

****4** ***440** The losses of $702 and $35.10 above enumerated were occasioned by the uncertainty of delivery of the models referred to and the increased elapsed period of performance by the stone-setting subcontractor due thereto. The item of $702 was field overhead or cost of the necessary retention on the subcontractor's pay roll of his superintendent, stone-setter foreman, labor foreman, stone derrick man, and rental on hoisting engines and derricks, all for a period of 13 days, which is the limit of delay claimed by that subcontractor against plaintiffs herein, and for which plaintiffs acknowledge themselves indebted to the subcontractor in the event that payment for the loss is adjudged an obligation in the first instance of the defendant. Other items of alleged loss or the necessity for expense incurred thereon are not satisfactorily proved.

5. The subcontract, made between plaintiffs and the subcontractor mentioned in the preceding finding, contained the following language:

21st. The Contractor or Subcontractor shall not in any event be held responsible for any loss, damate [sic], detention, or delay caused by the Owner or any other Subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of Contractor or Subcontractor, or in any event for consequential damages.

The court decided that the plaintiffs were entitled to recover only for the actual loss incurred by plaintiffs, $73.71.

Opinion

MADDEN, *Judge,* delivered the opinion of the court:

Plaintiffs entered into a contract with the United States on August 3, 1933, to furnish all labor and materials and perform all work required for "the construction, including approaches, etc., of the Post Office at Rochester, New York, per Bid No. 4 (using sandstone for all exterior stonework ***441** except where marble and granite are required and substituting steel casement windows for the aluminum casement windows)" for a consideration of $805,923.00, in accordance with designated drawings and specifications. The work was to be completed within 540 days after receipt of the notice to proceed. Plaintiffs were notified to proceed September 2, 1932, thus fixing the date of completion on or before February 24, 1934.

The defendant employed a firm of architects who were "authorized to prepare all drawings *** criticize and approve plaster models or ornamental work as shown or noted on contract drawings." Article 46 of the specifications provided that the defendant would furnish the models indicated on the drawings. Plaintiffs proceeded with the work but they, and the subcontractor with whom they had made a contract for the cutting of the marble caps and the ornamental work, were delayed because of the failure of the defendant to furnish the models for the exterior marble column caps for the porticos which were at two entrances to the building. The roofs of the porticos were supported by the columns, the caps of which were between column and frieze.

****5** The letter from the Supervising Architect, who was the duly appointed representative of the contracting officer under Article 30 of the specifications, to plaintiffs on January 26, 1934, shows that there was delay in furnishing models No. 6 and No. 7, due to the fact that the contract for the models had not been awarded because of faulty designs furnished to the Supervising Architect and the necessity for new designs. Award of the contract for the models was in May instead of the early part of 1933. The models were not approved until the following June and the marble caps were not received by plaintiffs until August 17, 1933.

The defendant does not deny that by reason of its failure to furnish the models plaintiffs and their subcontractor were delayed. A change order was issued extending the time for completion of the contract for 21 days. No allowance was

made in this change order for the actual loss sustained by plaintiffs and their subcontractor by reason of the fact that the delay caused plaintiffs to stop work to await the arrival of the models. The subcontractor had ***442** its force ready to go to work on the carving of the column caps. It was impossible for plaintiffs to complete the roofs of the porticos because the roofs were to be supported by the columns.

The actual delay caused to the subcontractor was for thirteen days. The actual damage sustained by the subcontractor due to the cost of labor and rental of equipment, which had to be kept idle awaiting the arrival of the models, and the uncertainty as to when they would arrive, amounted to $702.00. The subcontractor's overhead was $35.10, and the plaintiffs' extra overhead on account of this delay was $73.71.

Plaintiffs may have suffered other losses on their own account, as a result of the delay, but if so, they have not adequately proved them.

We have, then, a case in which plaintiffs are suing for damages sustained by themselves as a result of the Government's breach of contract and also for damages sustained by another person, a subcontractor. Plaintiffs may, of course, recover for their own loss, which so far as proved, was $73.71.

As to the items of $702.00 and $35.10 which represent losses of the subcontractor, we think plaintiffs may not recover. The subcontractor could not sue the Government since it has not consented to be sued except, so far as relevant to this case, for breach of contract. But the Government had no contract with the subcontractor, hence it is not liable to, nor suable by him. *Herfurth* v. *United States,* 89 C. Cls. 122.

If the subcontractor did have a claim against the Government, it could not transfer that claim to another person, plaintiffs, for example, since assignment of such claims is forbidden by statute. R. S. 3477; 31 U. S. C. 203. The Supreme Court said of this statute, in *Spofford* v. *Kirk,* 97 U. S. 484, 488, 489:

> ****6** It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the Government from creating an interest in the claim in any other than himself.

***443** See also *National Bank of Commerce* v. *Downie,* 218 U. S. 345; *Seaboard Air Line Ry.* v. *United States,* 53 C. Cls. 107; *Packard Co.* v. *United States,* 59 C. Cls. 354.

If, then, we regard the subcontractor as the real party in interest in this claim, we are faced with a legally forbidden attempted assignment of a non-existent claim.

If we look at plaintiffs as the real party in interest in their own suit, we encounter these facts. Plaintiffs did have a contract with the Government. That contract was breached. That breach might, if the contract had been one between private persons, have given rise to a right to win a suit, and to recover nominal damages, even if no actual damages resulted from the breach. But the futile exercise of suing merely to win a suit was not consented to by the United States when it gave its consent to be sued for its breaches of contract. *Nortz* v. *United States,* 294 U. S. 317, 327; *Great Lakes Construction Co.* v. *United States,* 95 C. Cls. 479, 502.

Plaintiffs therefore had the burden of proving, not that someone suffered actual damages from the defendant's breach of contract, but that they, plaintiffs, suffered actual damages. If plaintiffs had proved that they, in the performance of their contract with the Government became liable to their subcontractor for the damages which the latter suffered, that liability, though not yet satisfied by payment, might well constitute actual damages to plaintiffs, and sustain their suit. Here, however, the proof shows the opposite. The subcontract, which is in evidence, shows that plaintiffs and the subcontractor agreed with each other as follows:

> 21st. The Contractor or Subcontractor shall not in any event be held responsible for any loss, damate (sic), detention or delay caused by the Owner or any other Subcontractor upon the building; or delays in transportation, fire, strikes, lockouts,

> civil or military authority, or by insurrection or riot, or by any other cause beyond the control of Contractor or Subcontractor, or in any event for consequential damages.

****7** Thus plaintiffs, effectively so far as we are advised, protected themselves from any damage by way of liability over to the subcontractor for such breaches of contract by the Government as the one which occurred here.

***444** Plaintiffs must, then, so far as their claim includes items of losses suffered by their subcontractor, be merely accommodating another person who was damaged, by letting that other person use, for the purposes of litigation, the name of plaintiffs, who had a contract and could properly have sued if they had been damaged. Orderly administration of justice, as well as the statute against assignment of claims, seem to us to forbid that.

Plaintiffs may recover $73.71.

It is so ordered.

WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

WHALEY, *Chief Justice,* dissenting:

****7** I cannot agree with the majority opinion.

There is no legal or equitable assignment involved. This is an action by a contractor to recover damages suffered by himself and his subcontractor, occasioned by the delay of the defendant. It is admitted that defendant's delay caused damages to both the contractor and the subcontractor. The plaintiff failed to prove the amount of his own damages but the damages suffered by the subcontractor were established by clear proof. The majority opinion admits that the subcontractor was damaged in the amount of $737.10 by allowing overhead on this amount to plaintiff.

For fifty years it has been the settled doctrine of this court that a contractor could bring suit for himself and his subcontractor for losses occasioned by delay by the defendant before payment was made to the subcontractor.

In innumerable cases from *Stout, Hall & Bangs* v. *United States,* 27 C. Cls. 385, to *Consolidated Engineering Company,* No. 43159, decided February 1, 1943 (98 C. Cls. 256), this doctrine has been uniformly followed and never been questioned.

We must bear in mind that general contractors usually sublet specialized work like plumbing and electrical installations to subcontractors. The effect of the majority opinion would be to compel such subcontractors, and they are legion in numbers, to sue in their own names, which they could not do for lack of privity with the United States. This anomalous situation has never been recognized by this court in all ***445** its history. And the majority opinion cites no case in the Supreme Court in which subcontractors have been held to be assignors of claims against the United States, merely because they were unfortunate enough to be subcontractors.

The subcontractor of plaintiff agreed in his contract not to hold the contractor for "loss, damage, detention or delay caused by the owner."

****8** The contractor is the plaintiff in this action. The subcontractor is not suing the contractor or the defendant. Plaintiff is suing for himself and his subcontractor for an admitted loss. The defendant was not a party to the subcontract. No consideration has been paid by the defendant for the protection given the contractor in the subcontract and without it the defendant cannot avail itself of this defense.

In my judgment it is travesty of justice to allow plaintiff overhead on the losses suffered by his subcontractor and to deny recovery to plaintiff for his subcontractor of the amount admittedly due him from the defendant, which any court of equity would require the contractor to pay over to his subcontractor after payment to him by the defendant.

I think plaintiff is entitled to recover $810.81.

JONES, *Judge,* took no part in the decision of this case.

All Citations

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