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COURT OF APPEALS

STATE OF NEW YORK

LITTLETON CONSTRUCTION LTD.,

Appellant,

-against-

No. 96

HUBER CONSTRUCTION, INC.,

Respondent.

20 Eagle Street
Albany, New York 12207
May 05, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 96, Littleton Construction v. Huber
3 Construction.

4 Counsel.

5 MR. CONNERS: Good afternoon, Your Honor;
6 Adam Connors from Freid & Klawon. I'm appearing on
7 behalf of Littleton Construction Limited. I'm not
8 asking for any rebuttal time.

9 CHIEF JUDGE DIFIORE: Thank you.

10 MR. CONNERS: I'll start by saying I - - -
11 I agree that this is a troublesome case in terms of
12 the characterization of the key agreement that the
13 plaintiff's case relies on is fraudulent. However,
14 it is also brought in the context of there being no
15 original documents, any of these three agreements
16 that are - - -

17 JUDGE STEIN: But - - - but if it was a - - -
18 - if it was a cut-and-paste photocopy, what would be
19 the original?

20 MR. CONNERS: Well, Judge, in this case,
21 every document here that was - - - anybody was
22 examined about was a copy. And - - -

23 JUDGE PIGOTT: You say - - - you say that -
24 - - that there never was an agreement between the
25 two, that there was never a contract to - - - to do

1 anything with the schools, that none of these - - -
2 none of these documents exist?

3 MR. CONNERS: Well, not in - - - the
4 originals were never - - -

5 JUDGE PIGOTT: I understand you're saying
6 original. What I'm saying is what - - - there's a
7 difference between saying we don't have the original
8 because there's some question as to - - - as to what
9 document we're talking about.

10 MR. CONNERS: Okay, well - - -

11 JUDGE PIGOTT: But if you're saying this is
12 all a fraud, I mean, your guy - - - your guy cut and
13 paste, but - - - but Huber never had a contract with
14 you people, never had a contract that said what it
15 says, never had a contract that has those signatures
16 on the bottom.

17 MR. CONNERS: No, that's not what I'm
18 saying here, Your Honor. There - - - there are,
19 clearly, the original Boxhorn Memorandum of
20 Understanding and the Joint Venture Memorandum of
21 Understanding were all executed uncontradicted by all
22 the parties in this case.

23 JUDGE PIGOTT: Then why do we need the
24 original?

25 MR. CONNERS: Okay. Well, because in this

1 case, what - - - we're now being asked about an
2 operating agreement that Mr. Littleton testified that
3 he remembers signing, okay.

4 JUDGE STEIN: Is that enough to create an
5 agreement if one person signs?

6 MR. CONNERS: Well - - -

7 JUDGE STEIN: I'm not sure why we're - - -
8 why we're even discussing this document if - - - if
9 we only have proof that one person - - - and actually
10 - - -

11 MR. CONNERS: Well, yeah - - -

12 JUDGE STEIN: - - - I'm not sure about the
13 proof of that, either, but let's say we do have proof
14 that one person signed it, that's you. How - - - how
15 do we have a contract?

16 MR. CONNERS: Well - - -

17 JUDGE RIVERA: And apropos of that, if the
18 person you're trying to charge is the person who
19 didn't sign - - -

20 MR. CONNERS: Understood.

21 JUDGE RIVERA: - - - how do you hold them
22 accountable?

23 MR. CONNERS: Well, it is interesting
24 because this just doesn't exist in the context of Mr.
25 Littleton's testimony. There's also an e-mail

1 referred to in the plaintiff's brief here, the
2 appellant's brief, the May 27th, 2010, e-mail of Mr.
3 Schober, who was the president of the defendant,
4 Huber, where he refers to you have our agreements
5 that includes the joint venture agreement or, as
6 reworked, our operating agreement. That was in
7 response to Mr. Littleton's request for all the
8 agreements that they were operating under. In that
9 sense, this is really a case of, I believe, a
10 credibility issue that is not suitable for summary
11 judgment.

12 JUDGE STEIN: What - - - what is the
13 credibility issue?

14 MR. CONNERS: Well - - -

15 JUDGE STEIN: I mean if we're talking about
16 a document - - -

17 MR. CONNERS: Yes.

18 JUDGE STEIN: Okay, so - - - so is the
19 credibility about whether Schober signed that
20 document; is that the credibility issue?

21 MR. CONNERS: Well, yes, that Mr. Schober
22 makes reference to that document, that Mr. Littleton
23 says it was signed, that all these documents and - -
24 - and I believe all the parties concur that when they
25 would reach a new agreement, that they would cut and

1 paste from the old agreements. So that this - - -

2 JUDGE ABDUS-SALAAM: Was - - - was there
3 ever a document-styled operating agreement that was
4 signed by both parties? I think that was the
5 original question that was asked - - -

6 MR. CONNERS: Well - - -

7 JUDGE ABDUS-SALAAM: - - - and apparently
8 there isn't.

9 MR. CONNERS: Well, that is Mr. Littleton's
10 contention that that operating agreement, this final
11 operating agreement was, in fact, signed by all
12 parties.

13 JUDGE GARCIA: But did he testify to that
14 or just that he signed it?

15 MR. CONNERS: Well, when asked is that your
16 signature, he said yes, that is my signature.

17 JUDGE GARCIA: Right, so how do you get the
18 other party signed it from that testimony?

19 MR. CONNERS: Well, again, the - - - the
20 document, the copy of the document that is presented
21 has both signatures on it.

22 JUDGE GARCIA: But wasn't that signature a
23 cut-and-paste copy of the exact signature - - -

24 MR. CONNERS: Well - - -

25 JUDGE GARCIA: - - - off of another name?

1 MR. CONNERS: - - - that is what the - - -
2 the defendants have - - - have contended here that
3 this was a cut and paste just prepared by - - -

4 JUDGE STEIN: What evidence did you - - -

5 MR. CONNERS: - - - Mr. Littleton.

6 JUDGE STEIN: - - - prove - - - did you
7 submit to - - - to contradict that, other than this
8 e-mail?

9 MR. CONNERS: Well, again, I don't believe
10 there is any other evidence that - - - that we can
11 point to other than the fact that based on the prior
12 proceedings with these - - - between these parties,
13 the fact that they had a constantly evolving
14 understanding that did go through several different
15 versions of agreements. That we - - -

16 JUDGE STEIN: But didn't Mr. Littleton say
17 that - - - that Huber would never agree to - - - to
18 leave out this nine percent?

19 MR. CONNERS: Well, yes, I - - - I believe
20 there was some testimony in that regard. But - - -

21 JUDGE STEIN: So - - - so - - -

22 MR. CONNERS: - - - clearly, again, there
23 was a constantly evolving discussion between these
24 parties and subsequent attempts to resolve
25 differences. There's the overhead accord and

1 satisfaction with regard to some other issues, and it
2 is his contention that that operating agreement then
3 is - - - did not have that nine percent specified and
4 that is what he is making his claim under.

5 CHIEF JUDGE DIFIORE: Continue, counsel.

6 MR. CONNERS: Okay. Thank you. In any
7 event, again, just given the - - - the context of
8 this document, the - - - the prior documents, the
9 prior admissions of the cut and paste, I don't
10 believe the characterization of this final document
11 as fraudulent is warranted so as to reach the
12 standard where you say that the defendant has made a
13 prima facie showing that is, in fact, fraudulent,
14 that this is something that, again, relies on
15 something where the jury or trier of fact would have
16 to look at it, hear the testimony, hear Mr.
17 Littleton's testimony about his under - - -
18 remembering signing the document, questioning Mr.
19 Schober of what he was referring to in that e-mail,
20 and then taken in - - - at least taken in the - - -
21 the light most favorable to the plaintiff that this
22 is not something suitable for summary judgment. And
23 any other questions I'd be happy to address.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MR. CONNERS: Thank you, Your Honors.

1 CHIEF JUDGE DIFIORE: Mr. Powers.

2 MR. POWERS: May it please the court,
3 Michael Powers from Phillips Lytle representing the
4 defendants in this action. Your Honors, I won't
5 repeat at length the record that you've already
6 referred to, but it's - - - it's quite clear on this
7 motion for summary judgment that overwhelming,
8 undisputed proof, which includes admissions by the
9 plaintiff, lead to only one conclusion. In fact,
10 there is no issue disputed in this - - -

11 JUDGE PIGOTT: Justice Whalen and - - - and
12 Justice Fahey thought there were two about who
13 created the alleged forge - - - forged agreement and
14 what agreement the parties intended to control their
15 conduct.

16 MR. POWERS: Yeah. Respectfully, Your
17 Honor, both of those questions are legally
18 irrelevant. Who created the agreement doesn't
19 matter. I think it's fairly obvious that Mr.
20 Littleton created it because he's the only one who
21 had a motive to do it, and he initially denied it but
22 then he finally admitted that it was altered and that
23 it was cut and pasted. However, regardless who
24 created it the fact is that Huber never signed it.
25 Mr. Schober testified, it's on page 299 of the

1 record, paragraph 39, I never even saw that agreement
2 before. No one at Huber ever saw this thing. It was
3 produced five years after the alleged fact for the
4 first time, and he said I never signed it.

5 And, Your Honor, contrary to what counsel
6 said, there is not a sentence in this record where
7 that was ever disputed. Mr. Littleton has never said
8 that that agreement was signed by Huber because it
9 wasn't. And frankly, to have offered an affidavit or
10 testimony to the contrary would have been simply
11 certainly an ethical issue if not perjury.

12 Furthermore, as I believe Judge Rivera or
13 Judge Stein said, there are three admissions in here.
14 The plaintiff admitted that he - - - that Huber never
15 agreed to share the nine percent. The plaintiff
16 admitted that Huber refused to share the nine
17 percent. And the plaintiff admitted that no document
18 exists in which Huber agreed to share the nine
19 percent. That's not an affidavit by Huber. That's
20 the admission from the plaintiff's own mouth. Even
21 as late as April 30th, 2010, an e-mail was sent by
22 the plaintiff to Huber acknowledging that Huber is
23 entitled to the nine percent. So there simply is no
24 dispute about this, Your Honor, no credible dispute,
25 no genuine dispute.

1 And as we put at page 11 of our brief, if
2 you just put these documents side by side, I mean,
3 there's a common sense aspect to this and an honesty
4 aspect to this. It was a forgery. He cut and pasted
5 the page from the JVMOU, he put it on the unsigned
6 operating agreement, he cut out the paragraph, and
7 everything else is identical if you look at the
8 signatures and the dates. And think of this, Your
9 Honors. The JVMOU is executed on the 28th of
10 December, 2007, by Mr. Schober, by Mr. Littleton on
11 the 21st. And we're to believe that this agreement
12 was executed at the same time? So in other words,
13 they got done - - -

14 JUDGE RIVERA: Is cut and paste a usual
15 practice between these parties?

16 MR. POWERS: There - - - there is nothing
17 in the record to suggest that was ever the practice
18 between these parties, and I don't know where counsel
19 came up with this thing where they agreed to cut and
20 paste things. That, honestly, is the first time I've
21 ever even heard that.

22 JUDGE ABDUS-SALAAM: Is there an original
23 document of anything of something that wasn't sort of
24 put together by copying from something else or
25 cutting and pasting?

1 MR. POWERS: There's an original of the
2 JVMOU, and that was discovered late, and we actually
3 wanted to submit it to the court, but the plaintiffs
4 made a motion to disallow that. But the best
5 evidence rule is not at play here as one - - - one of
6 Your Honors suggested, when a party comes in and
7 says, yes, that's the document, that's a correct
8 document, yes, I signed it, which the plaintiffs did
9 as to the JVMOU. The best evidence rule doesn't
10 apply, and there's legions of cases to that effect.
11 So at the end of the day, you've got plaintiff's
12 admissions, you've got the JVMOU itself, you've got
13 Mr. Schober's affidavit saying I'm not even - - - I
14 never signed this and I never even saw the things
15 before which is undisputed. So that should end it
16 right there.

17 Very quickly, Your Honor, we also submitted
18 all the bids, the specification sheets, the bids, and
19 the contracts. Mr. Littleton testified that he
20 reviewed all of them, he participated in those
21 meetings, he knew where the bids came from, and right
22 on the top of every spec sheet is that nine percent.
23 So he originally testified that he never saw the spec
24 sheets, I didn't know where they came from, but at
25 page 743 they eventually - - - counsel admitted in

1 the brief he did see them, he knew what the bids
2 said, he knew what the contract said, he knew what
3 the specification sheet said, and he knew the nine
4 percent was in there. He's the one who signed these
5 contracts with that nine percent in there and gave
6 them to the general contractor, LP Ciminelli.

7 What had happened is he just decided he
8 wanted some more money so he came back late in the
9 day in October '12, and produced this - - - this
10 phony document, and that's the first time anyone ever
11 saw it. Now that was long after document discovery
12 was over and five years after that document was
13 allegedly entered into. And there comes a point in
14 time here, Your Honor, where not only have we carried
15 our burden on the motion for summary judgment but
16 there's just almost a silliness factor to some of
17 these arguments.

18 Very quickly, Your Honor, the accord and
19 satisfaction, Mr. Littleton kept pursuing the nine
20 percent because he knew he didn't have a right to it.
21 If he had had a right to it, he wouldn't have gone
22 through all this trouble of hiring a lawyer to come
23 up with a proposed agreement that we refused to sign.
24 So he was demanding payment for his overhead. We
25 refused, a dispute erupted. He refused to do work on

1 some of the projects. We had to get these things
2 done or it would have cost us a lot of money.

3 So there's a letter agreement of October
4 2009 where we agreed to pay him, in addition to
5 thirty-two dollars an hour; in addition to fifty-five
6 percent of the profits, even though he was doing
7 virtually nothing on the job; we agreed to pay him
8 1790 dollars a month to cover his overhead which we
9 were already covering. Now their response to that is
10 well, wait a minute, that covers overhead. Our
11 claim, in this case, is for management expenses. Not
12 so.

13 If you take a look at the amended complaint
14 paragraphs 9, 15, 16, and the addendum, the only
15 thing they've asked for in this case is a share of
16 the nine percent to cover their overhead expenses.
17 Management expenses never mentioned in the amended
18 complaint. So everything he seeks in this lawsuit
19 was covered in that October 2009 accord and
20 satisfaction and they - - - he agreed in that I will
21 make no future claims. All present and future claims
22 for overhead gone. Couple years later, he sues us
23 for the same thing.

24 And finally, Your Honor, we also introduced
25 a great deal of proof. I hope I haven't missed my

1 light here.

2 CHIEF JUDGE DIFIORE: No, you haven't.

3 MR. POWERS: Great deal of proof to show
4 that every individual expense for which he seeks
5 recovery in this case has been paid to him. We put
6 in the documentary proof, invoices, receipts,
7 everything. Not only didn't they dispute that, they
8 didn't even respond to that. So for all three of
9 those reasons, Your Honor, we would ask that this
10 order be affirmed.

11 CHIEF JUDGE DIFIORE: Thank you.

12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Littleton Construction Ltd. v. Huber Construction, Inc., No. 96 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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