

1975

John C. Hill v. Jacob Walstra, Mrs. Jacob Walstra, and Fray Walstra Zemp : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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JOHN C. HILL

30
BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

Plaintiffs and Respondents,

v.

No. 14104

JACOB WALSTRA, MRS. JACOB
WALSTRA and FRAY WALSTRA
ZEMP.

Defendants and Appellants,

APPELLANTS' BRIEF

Appeal from Judgment and from Order of the
Third District Court for Salt Lake County

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FILED

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Clerk, Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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JOHN C. HILL,	:	
	:	
Plaintiff and	:	
Respondent,	:	
	:	No. 14104
-vs-	:	
	:	
JACOB WALSTRA, MRS. JACOB	:	
WALSTRA and FRAY WALSTRA	:	
ZEMP,	:	
	:	
Defendants and	:	
Appellants,	:	

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APPELLANTS' BRIEF

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STATEMENT OF THE KIND OF CASE

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This action was commenced by the Plaintiff Contractor who alleges that he did complete construction of two duplexes in accordance with a contract and plans and specifications (See 86) and that Defendants owners owed to him the sum of \$7,444.19 under the terms of the building contract. (Exhibit 1-D; 88.)

Under a second cause of action plaintiff contractor alleges that he should be paid an additional sum of \$10,416.72 for additional labor and furnished materials requested by the defendants owners.

To plaintiff's Complaint the defendants owners Counterclaim alleging that plaintiff contractor contracted with them to construct the above

referred to two duplexes, in accordance with plans and specifications, with no exceptions whatsoever, and to complete the building project no later than May 1st, 1972. That the defendants owners made available to the plaintiff's contractor the entire loan amount of \$62,750.82 for payment under the terms of the building contract and the Plaintiff's contractor did wrongfully deplete and use said money without paying the construction costs thereon. (See 78; 79; 80) in addition thereto Defendants owners alleged that the Plaintiff's contractor fraudulently and wrongfully withdrew from defendants bank loan, money which was not used to the construction of the aforesaid referred to two duplex buildings and as a result thereof defendants owners should be awarded punitive damages.

DISPOSITION IN LOWER COURT

The case was tried to the court without jury. The Court entered judgment in favor of plaintiff's contractor for the most part and Defendants appeal.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the judgment, a review of the record of the trial court by this court, and judgement in Defendants favor as a matter of equity and law.

STATEMENT OF FACTS

On the 5th day of November, 1971, Plaintiff's and Defendants entered into a Building Contract (See Exhibit 1-D; 88; 71 (1);) which speaks for itself, and which specifically set forth that

"with no exception whatsoever to construct xxx
for \$62,750.82

xxx in accordance with the plans and specifications attached hereto xxx to be completed in a workman like manner no later than May 1, 1972."

The plans and specifications referred to above are set out and itemized. (See Exhibit 3-D; 66, 67, 68, 69,)

At the time the loan of \$62,750.82 was attained there was prepared by the parties under the direction of the Plaintiff's contractor (See 253, 254, 284, 338, ★ cost Break-down (See Exhibit 2-D) which set forth the estimated costs and expenses that would be incurred in building the two duplexes for defendants owners. The Referee Mr. Higginbotham hereafter referred to further as a Referee, did refer to the cost breakdown as being a part of the building contract and to find, dovetail and substantiate his figures. (See 105, 111, 122, 127,). Counsel for the Plaintiff's contractor early in the trial of this case took the position that it did not matter what the costs were for any one item.

"It doesn't matter what it is for this"
(talking about the cost of brick work and fireplaces).

"It is possible it cost more than \$62,750.82 to build these two buildings. Whether they put it in for more or less, if he did that makes absolutely no difference." (See 12,) also

"May I have a ruling on the cost breakdown, that that is not material to this lawsuit, that that was basis on which this final contract was made, and whether or not the plaintiff was able to perform each item under the cost breakdown all the time. This is based on the specifications. If the contractor goofed, he loses money. If he over bids and got a good contract, he makes money. But that is not this question here, so the cost breakdown is absolutely immaterial." (See 115, and 116)

Defendants owners were in full agreement with the above contentions of the Plaintiff's contractors counsel (See 116) but it was necessary to refer to the same so as to

further explain, substantiate and to carry the burden of proof that the plaintiff was to do such work in building the two duplexes and such work was not an extra that the Defendants owners were obligated to pay therefore.

At the commencement of the building there was made available to the Plaintiff's contractor the entire amount of the contract price of \$62,750.82. The Plaintiff's contractor was the contractor, and working under him as an employee prior and at the time was Bill Zemp, who was the husband of Fray Zemp, one of the named defendant owners. (See Exhibit 28-D).

At the time the ^{Plaintiff}~~owner~~ ceased working on the building of the two duplex project which was the 21st day of June, 1972, (See 335, 378,) when the Defendants owners stopped further withdrawals from the building loan sum of \$62,750.82, the Plaintiff's contractor had withdrawn the sum of \$61,499.64 (See total of the itemized draws #1 to #51 totaling the sum of \$61,499.64 set forth in pages 1 and 2 of Referees Exhibit 2-R found in brown envelope of Court transcript marked 42). Leaving, according to the Referees report, the sum of \$1,251.18 available to pay and finish the building job. The Court thereafter first found there was \$1,012.10 left to finish the job with (See Memorandum Decision (See 16) also Exhibit 33-D and 337)), and thereafter in its Amended Judgment (See 11) found the amount to be \$1,423.18 as the amount available to pay and finish completely the building job. (See Exhibit 33-D).

It may not be material but it is interesting to note that the Plaintiff's contractor kept and paid himself from said \$61,499.64, and to himself paid out of the loan the sum of \$14,121.76 of which \$5,592.00 he took as wages and the balance as payment of ? (See 364) (See pages 1 and 2 of Referees Exhibit 2-R as draws #4 for \$3,000.00, draw #10 for \$650.00; draw #16 for \$4,000.00; draw #23 for \$4,417.76 and draw #34 for \$2,000.00, Total \$14,121.76,, found in brown envelope of court transcript marked 42) when under the cost breakdown that he himself helped prepare he allowed the sum of \$6,000.00 to be provided for himself (See Exhibit 2-D; 283, 284, 358, 364, 389,).

Plaintiff,s contractor justifies a part of the \$61,499.64, he withdrew from the building loan money as payment for extra's but the fact is that there was no authority given by any of the defendants owners (See 350, 352, 355, 357, and 359,), Bank or any one whatsoever to use this \$62,750.82 for anything other than the construction of the two duplexes and for those items set forth in the plans and specifications (See Exhibit 1-D (Contract); Exhibit 2-D (Cost breakdown); Exhibit 3-D (Specifications; and plans 5-D, 6-D, 7-D, 8-D,)).

The fact is and the trouble is in this case that the trial court as well as the Referee treated for accounting purposes the building contract and the extra's done as one and the same when they are not the same. The burden of proof is on the Plaintiff's contractor to prove his extra's charged, and if proved, or admitted then the Defendant

owners are personally liable to him for such extra's. Payment for extras were not authorized to be paid from the loan money. The burden of proof is also upon the Plaintiff's contractor that he did build the two duplexes as he contracted to do, and upon the defendants owners that he did not do so, or if so, he did not pay for doing the same, and Defendant's had to pay therefore.

MONEY PAID BY DEFENDANTS OWNERS:

The facts are as follows, and the Plaintiff's contractor does admit the following 1 to 6 items were paid by the defendants owners. (See 368 and also 4-R of Referees report found in **brown** envelope marked 42.)

(A) The Plaintiff's contractor had drawn all the money out of the \$62,750.82 loan except the sum of \$1,251.18, and as a result the Defendants owners had to pay the following, because there was no loan money to pay the same:

1. Brick work and Fireplaces: (Document 77495, Exhibit 4-R Brown envelope 42; Exhibit 3-D; 105, 106, 107, 368)
Cost was \$5,382.00. (Cost Breakdown was \$8,412.00)
Defendants owners paid out \$5,382.00.
Plaintiff's paid none.
Summary: Plaintiff's owes Defendants sum of \$5,382.00.
2. Black Top: (Document 0938, Exhibit 4-R Brown envelope 42; Exhibit 3-D; 108, 109, 110, 368)
Cost was \$1,437.92. (Cost Breakdown was \$1,506.00)
Defendants owners paid out \$1,437.92.
Plaintiff's paid none.
Summary; Plaintiff's owes Defendants sum of \$1,437.92.
3. Tile and Hardware: (Document 3164 and Misc. Fixtures, Exhibit 4-R Brown envelope 42; De Gooyer Tile and Marble for bathroom ceramic tile at page 3 of specifications, (See Exhibit 3-D = \$1,100.00)
Hardware for bathroom = \$320.00. (See cost breakdown 2-D) Cost breakdown was \$260.00

Total Cost = \$1,420.00 (\$1,100.00 plus \$320.00)
(See Exhibit 2-D; Exhibit 3-D; 111, 112, 113, 114, 130, 371, 368.)

Plaintiff contractor paid none of the \$1,420.00
Defendant owner paid the sum of \$1,420.00 by
paying \$1,100.00 for the tile and \$320.00 for
bathroom hardware.

(See Referees discussion "O" found at page 7 of
Referees report found in brown envelope marked
42). Plaintiff owner excused obligation to pay
\$1,420.00 by stating without proof he had a bid
from a Conrad Featherstone to do the Tile and
provide the hardware for a total sum of \$1,299.48.
(See 268) not proven.

Summary - In an effort to give the Plaintiff
contractor the benefit of every doubt, even by
self serving statement and without proof the
Plaintiff contractor owes the sum of \$1,299.48.

Summary - Plaintiff contractor owes Defendant
owners the sum of \$1,299.48.

4. Formica-Kleins Tri Cove: (Document 0939)
(See item 19 of specifications Exhibit 3-D;
67.)

Cost was \$475.71

Plaintiff contractor paid none of the \$475.71
Defendant owner paid \$475.71 (See 169 and 368,
308, 309.)

Summary - It was stipulated that of the \$475.71
paid by the Defendant owners on behalf of the
Plaintiff contractor and the balance of \$284.23
was paid by and for the Defendants owners own
benefit. (See 169.) Leaving \$186.76 owed to
Defendants owners.

Summary - Plaintiff contractor owes the Defendants
owners the sum of \$186.76.

5. Electric - A & B Electric (Document 119)
(See Referees report Exhibit 4-R in brown
envelope marked 42; also 118, 131, 371,
372, 368.)

Cost to Defendant was \$300.00 plus \$20.40 = \$320.40

Plaintiff contractor paid none of the \$320.40

Defendant owner paid \$320.40 by check for \$300.00
and check for \$20.40. (See Referees report Exhibit
4-R in brown envelope marked (42).)

Summary - Plaintiff contractor owes defendant
owners the sum of \$320.40.

6. Holladay Lumber for lumber (Document 2370)
(See Referees report Exhibit 4-R in brown
envelope marked 42, document 2370; 118, 132,
169 (Stipulated), 368.)

Cost to Defendant was \$101.54 (balance left to clear
lumber account (169)).

Plaintiff contractor paid none of the \$101.54
Defendant owner paid all of \$101.54 (See stipulation
(169)).

Summary - Plaintiff contractor owes the Defendant
owner the sum of \$101.54.

7. Richard Mason (Carpeting) (Document 1)
(See cost breakdown under decorating
Exhibit 2-D and specifications 3-D sub
section 8 calling for Oak floors for which
carpeting was substitution; 118, 119, 120, 121,
209, 231, 338, 339, 341, 368,.)

Cost to Defendants was \$320.00

(There were 2 duplexes, the plaintiff's contractor
paid for 2 carpeting at \$1,472.00 each, and for the
laying of one carpet to Richard Mason for \$320.00
which the Defendant owner had to pay \$320.00, and
although the Defendants owners paid the sum of \$320.00
from money they received from the loan payment was by
and from the Defendants owners and the Plaintiff's
contractor did not pay the same. (See 217, 231, 339,
368.).

Summary - Plaintiff's contractor owed Defendant's
owners the sum of \$320.00.

8. Hank Van Tienderen for Painting (See Referees
report Exhibit 4-R under payment made by Fray
Zemp wherein it is not disputed that defendants
owners paid the sum of \$700.00, found in brown
envelope marked 42, also 122, 368.)

Cost was \$700.00 (Cost breakdown = \$3,100.00)

Plaintiff's contractor paid none of the \$700.00

Defendants owners paid \$700.00

Summary - Plaintiff's contractor owes the Defendants
owners the sum of \$700.00.

9. Murray Moffat for Foundation plastering (See
Referees report Exhibit 4-R under payments made
by Fray Zemp wherein it is not disputed that
owner Defendants paid the sum of \$160.00, found
in brown envelope marked 42, and 368.)

Cost was \$160.00

Plaintiff's contractor paid none of the \$160.00

Defendants owners paid the \$160.00

Summary - Plaintiffs contractor owes Defendants
owners the sum of \$160.00.

10. Harper Excavating for grading and leveling
property (Document 1099) (See Referees report
Exhibit 4-R under payments made by Fray Zemp,
wherein the Referee put the payments down as a
disputed item under the building contract
found in brown envelope marked 42, document 1099;
also 123 for reason it was put down as disputed and
131 wherein it is admitted to be in the spec-
ifications and would not be disputed except for
the Plaintiff's contractor telling the Referee
it should be

Cost was \$215.25

Plaintiff's contractor paid none of the \$215.25

Defendants owners paid \$215.25.

Summary - Plaintiffs contractor owes defendants owners the sum of \$215.25.

Summary of above 1 to 10 items which the Defendants owners had to pay out because the Plaintiff's contractor had taken out of the \$62,750.82 the sum of \$14,121.76 for his own wages, leaving the sum in the bank of \$1,251.18 to pay the debts paid by defendant owners which total \$10,123.10. Which Plaintiff contractor owes defendant owners = \$10,123.10, enumerated 1 to 10 aforesaid.

Additional Breach of Contract and Damages Incurred by Defendant - owners.

1. In addition to the foregoing work totalling \$10,123.10 contractor was obligated to do and pay for out of the \$62,750.82, and which the Defendant - owners paid for in the sum of \$10,123.10, it was necessary to replace the Black Top job that was done in a defective manner, with and under the Plaintiff's contractor knowledge and direction at a replacement expense of \$1,700.00 to defendant - owners of which 60% thereof in the amount of \$1,020.00 was a replacement cost. (See 170, 171, 172, 173, 174, 175, 178, 180, 237, 266 (Admission)).

2. Also the Defendants-owners did lose the sum of \$1,138.43 interest paid on the loan during the time from the 1st day of May, 1972, when the job was to be finished to three (3) months later ^{when} ~~and~~ the duplexes could have been rented. (See stipulation 223, 234,).

3. Also the Defendants owners did lose an un-estimated amount of rentals as a result of the Plaintiff's contractor failing to finish the job by the day of May 1, 1972, and not until three months later (See 227, 223, 234,).

4. In addition to the foregoing costs and expenses incurred, the Plaintiff's contractor did breach the contract he had with the Defendants-owners in the following particulars:

- (1) Milked the sum of \$14,121.76 from the loan before paying the necessary bills and expenses owed of \$10,123.10, instead of using the money first to pay bills owed under the contract.
- (2) Payment of so-called extra's out of the building loan without authority of the defendants - owners to do so. (See 350, 352, 355, 357, and 359)
- (3) Failed to finish the job on time (See 234, 392)
- (4) Put on without authority or a change order a much cheaper roof, that is asphalt shingles instead of wooden shingles, as obligated to do under the specifications at a savings of \$5,063.85 to himself at the expense of the defendants - owners. (See Exhibit 3-D (8); 210, 231, 247, 248, 327, 328, 329.)
- (5) Failed to install visquin under cement floor at a saving to himself of a mere \$50.00 notwithstanding that it would now cost an estimated cost of \$1,400.00 to tear up the basement cement and install the same as the specifications required, and which the plaintiff's contractor admits he knew of and did not do. (See 373, 374, (admission))
- (6) Failed to install in accordance with the plans and specifications (See Exhibits 3-D; and the following: (See 279, 285, 286, 357, 358.)
 - (A) Storm doors - cpst = \$180.00 (See Exhibit 3-D (18); 331, 375, 376, 378, (admission))
 - (B) Gutters and Downspouts - Cost= \$100.00 (See Exhibit 3-D (13) ; 331, 375, (admission))
 - (C) Sumps- Cost = \$150.00 (out and in again Exhibit D-6, D-7; (admission, See 135, 137, 183, 189, 196, 286, 287, 290, 291, 342, 343, (admissionn) 362.) Cost=\$150.00
 - (D) Electrical work - The plans and specifications call for a number of

electrical circuits (See 372, 376, 377, Exhibit 3-D (24) Cost = \$600.00.

- (E) Failed to put in Oak Floors - Cost = Considerable (See Exhibit 3-D (8); 270, 375, (admission)).
- (F) Sealer on the roof-Cost = Considerable (See 375 (admission))
- (G) Used loan money to pay for favors received (See Leo Schmillkofer Matter 101, 128, 129, 272 (admission) 310, 311,) Cost=\$78.36.
- (H) Used loan money to pay for workmans saw repairs and other jobs. (See 101, 126,) Cost = \$31.82.
- (I) Failed to install shutters Cost- Unknown (See Exhibit 10-P; 210, 272, 312 (admission))

Total of above 1 to 6 (A) to (I) Damages = \$8,376.46

The trial court completely ignored the defendants-owners counterclaim for repayment from the Plaintiff's -contractor the money they had paid out in the sum of \$10,123.10 and which the Plaintiff's contractor in most cases admitted was an obligation to be paid under the contract and from the \$62,750.82 Bank Loan provided for payment thereof as well as damages incurred by plaintiff's contractor not finishing the job as set forth above and totalling \$8,376.46 documented. As a result the defendants owners Counterclaim was denied "No cause of Action" (See 12) and the Court granted judgment against the defendant - owners in favor of the Plaintiff's contractor for \$3,094.30 (See 11).

At the time there was left the sum of \$1,423.18 from the \$62,750.82 Bank Loan.

The ~~trial~~ Court did in supporting its \$3,094.30 judgment to the Plaintiff's contractor did allow the Plaintiff's contractor the following "Extra's" (See Courts Memorandum Decision 16; Recapitulation as shown in Exhibit 33-D; and Amended Judgment, Findings of Facts and Conclusion of Law

EXTRAS CLAIMED BY PLAINTIFF'S CONTRACTOR

Without authority of the defendants owners (See 359, 207, 208, 209, 213,) or by authority of law (See 350, 352, 354, 355) the Plaintiff's contractor justified his non-payment of incurred debts due under the Bank Money Loan of \$62,750.82 on the basis of so called "Extra's" that he claimed he was entitled to be paid for at the expense of the Bank Money Loan of \$62,750.82. Some so called "Extra's" the Defendants owners agree they are liable to pay for and others they dispute as being obligated to pay (See 214). Plaintiff's contractor admits that he never discussed "Extra's" on payment thereof until after the same was done and had not billed for payment of the same prior to the commencement of this law suit. (See 213, 359,).

It is also interesting to note that the Plaintiff's contractor "Corrected Recapitulation" "Exhibit" "A" prepared by Plaintiff's counsel Mr Midgley (See Exhibit 33-D; also incorporated in Courts Memo Decision, 16; and final Judgment 11, 12, 13, and 14) admits the defendant owners paid out the sum of \$8,614.62 on the "Basic Contract Price" of the two (2) duplexes. (See Exhibit 33-D). Actually the sum should be \$10,123.10 as here to before enumerated.

The following are Extra Items allowed by the trial Court as valid claims made by the Plaintiff's contractor and the Defendants owners comments concerning the same. (See Exhibit 33-D entitled Corrected Recapitulation Exhibit "A".)

Extra's Paid by Draws. (2-R of Referees Report 42)

and allowed by the trial court:

1. Voucher #28 Post Hole \$63.64

Evidence:

Plaintiff admitted he was obligated to do job of fencing as per plans and specifications (See 285, 357, 358). further admitted that such plans and specifications should and had to be approved by the proper zoning and permit issuing government authorities (See 297, 298, 299,). Further admitted that he knew a fence was mandatory (See 297, 298, 299,). The plans submitted to the Bank and marked approved and upon which the Bank loaned \$62,750.82 setforth thereon a fence to be installed. (See Exhibit 6-D and 7-D testimony of Bank Witness; 149, 150, 151, and 152). That the fence required by law and was setforth in the plans before they could be passed and was so setforth by witness Kenneth Jones (See 317, 318, 319,) the Assistant Planning Director for Salt Lake City and County who testified that he dated the same the 25th day of August, 1971, See Exhibit 6-D; 317), which was some 2½ months before Plaintiff's contractor and Defendant owner contracted together on the 5th day of November, 1971 (See Exhibit 1-D) for the building job.

CONCLUSION:

In the face of the foregoing evidence the Court allowed and approved everything related to the fence as being an extra and allowed the \$63.64 which Defendants-owners do dispute and allege should not be allowed because the fence is not an "Extra". Amount \$63.64 should not have been allowed.

2. Voucher #33 Fence Material \$1,105.65

EVIDENCE:

(Same as setforth in #1 above.)

CONCLUSION:

(Same as setforth in #1 above.)

* * *

3. Voucher #31 Haun #333.00

EVIDENCE:

Witness Haun submitted a bill for \$999.50 for labor only in installing sewer (See Exhibit 20-D; 182, 185) and at the time he did the labor he added on a "Y" connection so that if in the future the Defendant-owners wished and could build a 3rd duplex a connection could be made to the existing sewer lines and for this labor he admitted the sum of \$65.00 was a reasonable charge. (See 188.) The Plaintiff's contractor claims because of a possible "Y" stub for a third duplex he should be reimbursed \$333.00, that is 1/3 of the \$999.00 labor cost instead of the sum of \$65.00, because a 6 inch sewer pipe was put in instead of a 4 inch sewer pipe.

The witness tried to uphold the contractor on representing this bigger pipe position and both were made guilty of false representations by the testimony of witness Dean MacNeil, the sewer inspector on the job, who testified that a 6 inch sewer line was necessary by law to service two duplexes, that a 4 inch sewer line for two duplexes would have been unlawful and unacceptable. That the only lawful sewer line that could be put in for (2) duplexes would be a 6 inch line and most all contractors know such to be the law. (See 323, 324, 325). It is interesting to note that counsel for Plaintiff's

contractor tried to impress the court of his claim that it would be a financial advantage to the defendants owners in the event a third duplex was later built, but sure did object to the defendants owners pointing out that he made thousands of dollars over the cost breakdown on his wages (\$8,500.00); Brick work (\$3,030.00); Shingles (\$5,063.85); Oak floors; Electrical; and other items such as storm doors, Gutters and downspouts, shutters, fire hydrant etc. which he failed to install.

CONCLUSION:

The trial court evidently was impressed because plaintiff's contractor was given credit for \$333.00 as an extra because the sub-contractor did \$65.00 worth of labor installing the "Y" for a possible future third duplex hook up notwithstanding the plaintiff's contractors obligation under the existing contracts to install at a labor cost of \$834.50 (\$999.50 less \$65.00) A six inch sewer line: Amount allowed = \$333.00
Should be = \$65.00

* * *

4. Voucher #36 Haun \$202.79

EVIDENCE:

Witness Haun submitted a bill for \$608.36 for material only in installing sewer (See Exhibit 21-D; 182, 184) and at the time he supplied the material which was a "Y" piece of pipe he admitted the value thereof to be \$40.00 (See 188) and the further comments set forth in #3 above apply equally here.

CONCLUSION:

(Same as set forth in #3 above)

Amount allowed = \$202.79
Should be = \$40.00

* * * * *

5. Voucher #42 - Tri Cove \$284.20

EVIDENCE:

Plaintiff's contractor first claimed \$471.00 as an extra but stipulated with defendants owners that the sum of \$284.20 could be classified as an extra (See 169).

CONCLUSION:

The sum of \$284.20 on the Tri Cove debt be classified as an "Extra".

Amount allowed = \$284.20
Should be = as above

* * * * *

6. Voucher #51 - Irrigation Ditch and Sumps \$601.80

EVIDENCE:

Witness Haun (hereto before referred to in #4 and #5 above), did dig an irrigation ditch for the plaintiff's contractor and did also install 2 sump pumps at the same time. For this work he rendered a bill for \$601.80 (See Exhibit 19-D; 183) and which the plaintiff's contractor with the Courts approval says the defendants owners must pay notwithstanding the two (2) sumps are required in the plans and cost breakdown at \$75.00 for each sump (See Exhibit 2-D; 5-D; 6-D; 7-D; 183,) which amounted to the sum of \$150.00 which should be deducted from the \$601.80. (See Exhibit 19-D; 183,) also one sump was improperly placed in the driveway and a new one should be installed in place thereof at a further cost of \$75.00, which should be also deducted from the \$601.80 (In=\$75.00+outcost=\$75.00 + in at new location = \$75.00 = \$225.00 from \$601.80 = \$376.80.)

Amount allowed = \$601.80
Should be = \$376.80

* * * * *

SUMMARY:

From the above 1 to 6 the Trial Court found the defendant owner should pay the plaintiff contractor the sum of \$2,591.08 (See Corrected Recapitulation Exhibit 33-D) notwithstanding that the fence is under the contract plans and the sumps are under the contract plans and breakdown.

Defendants owners contend that the sum should be post hold = none; fence material = none; Haun labor = \$65.00; Haun materials = \$40.00; Tri-Cove = \$284.20, and Haun irrigation ditch = \$376.80 for a total amount owed of \$765.80 owed for extras instead of the \$2,591.08 allowed by the Court.

-----B (3-R) -----

FURTHER COURT ALLOWANCES

Next under the Corrected Recapitulation Exhibit 33-D the Court bought and approved the sum of \$2,278.79 setforth in the Referees Report under 3-R found in brown envelope marked 42, less the sum of \$31.82 paid out for "Bill Zemp Saw" for a net amount of \$2,246.97.

Charged as extra's under the said 3-R of the Referees report, not questioned and bought by the Court are the following:

1. Document 22- Sewer Permits \$650.00

EVIDENCE:

Sewer permits were necessary by law and payment was provided therefore in the Cost breakdown. (See Exhibit 2-D.)

CONCLUSION:

Should be paid by plaintiff's contractor as money was available for payment from the Money Bank Loan of \$62,750.82.

Amount allowed as Extra = \$650.00
Should be = NONE

* * * * *

2. Document 142 - Post Hole Digger \$31.08

EVIDENCE:

Part of fence necessary and set forth in approved plans. (See Exhibit 6-D and 7-D). The fence has been discussed previously and the same facts apply to this claimed and allowed "Extra".

Amount allowed as Extra = \$31.08
Should be = NONE

* * * * *

3. Document 150 - Water Share Permits \$275.00

EVIDENCE:

Water meters at \$175.00 each for amount of \$350.00 as well as Fire Hydrants in the amount of \$1,200.00 is set forth in the Cost breakdown and this charge should be paid thereundo. (See Exhibit 2-D;)

CONCLUSION:

There was the sum of \$1,550.00 available to pay this \$275.00 from the Bank Loan Money and plaintiff's Contractor should have paid it. (See Cost Breakdown under "Water Meters and Fire Hydrants".)

Amount allowed as Extra = \$275.00
Should be = NONE

* * * * *

4. Document #152 Hydrant Permits \$930.00

EVIDENCE:

Provided for the Cost Breakdown (See Exhibit

2-D; also see _____). The amount of \$1,200.00 was set apart to cover this expense in the Cost Breakdown and the Hydrants were a necessary expense for the plaintiff's contractor to deliver to the defendants owners two completed duplexes under the contract.

CONCLUSION:

There was \$1,200.00 specifically earmarked for the payment of the above \$930.00 and plaintiff contractor was fully aware of the obligation to pay for the same. Defendants owners should not have to pay anything.

* * * * *

5. Document #120 Permit bigger water line \$120.00

EVIDENCE:

(3/4 to 1 inch line permit)

No question under the contract that the plaintiff's contractor was obligated to provide water. As such, assuming that a bigger line was installed that cost \$120.00 for the complete line, there should be some Credit for the cost of the 3/4 inch smaller line that the plaintiff's contractor didn't put in, but was obligated to put in.

CONCLUSION:

The plaintiff's contractor did not carry his burden of proof on the correct amount of difference and testimony was solely as to the cost of the 1/4 inch bigger line. Plaintiff's contractor would be entitled to the difference between what a smaller line would be and what the larger line permit would

be, but no evidence was given concerning this amount, and so should not be allowed for the same reason loss of rent cannot be allowed to the defendant owners because there is no evidence to support the same.

Amount allowed as Extra = \$120.00
Should be = NONE

* * * * *

6. Document #197 - Hauling gravel garbage \$15.00

EVIDENCE:

Plaintiff's contractor contends extra and defendants owners deny.

CONCLUSION:

Should be plaintiff's contractors obligations and plaintiff contractor has not carried burden of proof that it is the defendants owners obligation to pay this to get finished job.

Amount allowed as Extra = \$15.00
Should be = NONE

* * * * *

7. Document #214 - Hauling gravel for sumps = \$18.00

EVIDENCE:

The plans call for sumps, the cost breakdown specifically sets out sumps, the plaintiff's contractor admits that he misplaced the location of one of the two (2) sumps, that gravel is necessary for a sump and yet wants to be paid more when he supplied the figures on the cost breakdown which provided the sum of \$75.00 for each sump. (See Exhibit 2-D;).

CONCLUSION:

Should be paid by plaintiff's contractor from money available for payment from the Money Bank Loan which was loaned in reliance on the Cost Breakdown figures supplied by the

plaintiff's contractor, and the plans and specifications.

Amount allowed as Extra = \$18.00
Should be = NONE

* * * * *

8. Documents;

11 checks - Olsen labor on fence	=	\$27.50
6 checks - Vigos labor on fence	=	\$18.00
5 checks - Blackett labor on fence	=	<u>\$129.00</u>
TOTAL	=	\$174.50

EVIDENCE:

The above amounts are joined together as being related to alleged labor costs in the erection of the fence heretobefore discussed in more detail. The fence is in the plans which were approved and necessary before the Bank Loan Money was made available to the plaintiff contractor and the Bank Loan Money would not have been available in the amount it was without the fence being the obligation of the plaintiff's contractor. Plaintiff's contractor pleads ignorance of such plans but he is the contractor and admits that he knew that a fence was necessary, that plans had to be approved with a fence before the money could be loaned. (See Exhibit 6-D; 7-D; 285, 357, 358, 297, 298, 299, 149, 150, 151, and 152).

CONCLUSION:

Should be paid by the contractor as money was extended by the Bank on approved plans that plaintiff's contractor knew of or should have known thereof.

SUMMARY:

From the above 1 to 8 items the Trial Court found the Defendant owners should pay to the plaintiff contractor the sum of \$2,246.97 (See Corrected Recapitulation Exhibit 33-D).

Defendant owners contend that the sum should be, Sewer permits = None; Hydrant permits = None; 3/4 to 1 inch bigger water permit = None; Hauling Garbage and gravel = None; Sump gravel = None; Fence erection labor checks = None. Total = None.

----- C (3-R) -----

FURTHER COURT ALLOWANCES

1. Bill Zemp - Labor fence	= \$294.50	
2. Hill - labor fence	= \$120.00	
3. Insurance	= \$104.50	
4. Payroll taxes	= \$34.25	Total \$553.25

(See Exhibit 6-D, 7-D; 285, 297, 298, 299, 149, 150, 151, 152, 317, 318, 319, 357, 359, 363, 364, 366.)

* * * * *

1. Bill Zemp - Labor Fence = \$294.50

EVIDENCE:

Plaintiff contractor contends the fence was an Extra, the defendant owners contend that the fence was set out in the approved plans that plaintiff contractor was being paid \$62,750.82 to build therefrom. Plaintiff contractor admitted that he did not know how many days Bill Zemp had worked on the fence.

CONCLUSION:

Bill Zemp's wage was \$5.00 an hour and he would have had to put in 58 hours working on the fence. Nearly one and a half weeks. In any event, the fence was a part of the contract which provided that the building would be done as specified in the plans, and should not be allowed as an Extra.

Amount allowed	= \$294.50
Should be	= NONE

* * * * *

2. Hill labor - fence = \$120.00

(See 133, 222, 223, 241, 243, 244, 245, 246, 257, 317, 318, 319, 363, 364.)

EVIDENCE:

Plaintiff contractor admitted that his wages on the building job amount to \$5,392.00 and that he took out of the loan money the sum of \$14,121.76 and the difference between amount to nearly \$9,000.00 he retained the same for extra work he did.

(See 364.)

CONCLUSION:

Plaintiff contractor has taken nearly \$9,000.00 out of the loan funds and if the fence is an Extra has certainly been paid for the same from the afore said \$9,000.00. If the fence is a part of the contract then plaintiff contractor should not be allowed the above \$120.00 and if not he has already been paid from the nearly \$9,000.00 he has already taken from the loan money without permission of defendant owners. (See 364.)

Amount allowed = \$120.00
Should be = NONE

* * * * *

3. Insurance = \$104.50

EVIDENCE:

Plaintiff contractor contends that he is entitled to this amount because the Referee in his report @ 3-R thereof found in Brown envelope 42, had put it down as Disputed, the reason for doing so was based solely on what the plaintiff contractor informed the referee what it should be, and without checking it out or consulting with the defendant owners he put it down on the word of the plaintiff contractor to be disputed or as extra. (See 117, 118, 129, 130, 138, 139,).

The referee explains the charge as being due to the plaintiff contractor because it was a portion of the "course of constructor insurance" that the defendant owners converted to

their own insurance account after construction was completed and this amounted to \$104.50. (See discussion J. Travelers Insurance - \$104.50 (Exhibit 3-R) found on page 6 of the referees report.) This is another example of misleading and false information supplied by the plaintiff contractor. The truth is set out by the testimony of plaintiff's own witness, Don Lewis Smith, (See 145, 146,) who testified that the \$104.50 was for site insurance coverage from December 3, 1971, to June 23, 1972, on the cost of construction policy only. The building contract (Exhibit 1-D) provided the job he finished by the 1 day of May, 1972, and was dated the 5 day of November, 1971. Plaintiff contractor admits he did not finish the job on the 1 day of May, 1972, (See 155, 388, 392, for final in July of 1972).

Under the foregoing evidence the amount of \$104.50 was insurance coverage obligated to be paid by the plaintiff contractor to the contract completion date of May 1, 1972, and although the coverage was for nearly two months longer to the 23 day of June, 1972, it hardly follows that the defendant owners should have to pay for the full coverage from the 3 day of December, 1971, to the 23 day of June, 1972, and ^{actually} should be obligated to pay nothing because a final inspection was not had until July of 1972. At that time the building was not even completed as storm doors, gutters, shutters etc were still missing.

CONCLUSION:

Plaintiff contractor was obligated to provide the site insurance coverage for his own protection and the referees

finding based upon the mis-information supplied to him by the plaintiff contractor should not justify the defendant owner having to pay all of the site insurance coverage that plaintiff contractor had for his own protection.

Amount allowed = \$104.50
Should be = None

* * * * *

4. Payroll taxes = \$34.25

EVIDENCE:

This is a claim for taxes owed on labor claimed as an extra on the fence.

CONCLUSION:

Not justified because the fence was not an extra, was a part of the plans referred to in the basic contract; further a portion thereof, if all of it was deemed to be an extra, the portion of taxes on the \$120.00 could not be allowed because the plaintiff contractor has already received nearly \$9,000.00 for payment thereof.

Amount allowed = \$34.25
Should be = None

SUMMARY:

Except for the \$104.50 claimed to be owing for insurance which was for plaintiff contractor's protection solely and therefore should not be the obligation of the defendant owners, the other \$294.50, the \$120.00 and the \$34.25 is an expense related to the fence and as such is not an "Extra", but an expense of the building contract, and the sole obligation of the plaintiff contractor.

Defendant owners should not be obligated to pay any of

the \$553.25, which the Trial Court gave the plaintiff contractor owner judgment for.

DEFENDANTS' MISCELLANEOUS

1. Tile Zemp - \$1,412.00

Firm Bid Hill - \$1,299.00

Amount owed - \$113.00

EVIDENCE:

This is crazy! The defendant owners paid out \$1,100.00 to De Gooyer Tile and Marble and the sum of \$312.00 to Holliday Lumber and Sears, for miscellaneous fixtures and hardware, which the referees report under 4-R sets forth that the defendant Fray Zemp paid and which the plaintiff contractor admits she did pay (See Referrees report Exhibit 4-R found in brown envelope 42) a total of \$1,412.00. Because he had a bid for \$1,299.00 makes no difference unless he has paid it. The plaintiff paid not one cent on the Tile and Hardware, the defendant owner paid out \$1,412.00 and now the plaintiff contractor wants to be paid the further sum of \$113.00, the defendant owner has already paid. If the plaintiff contractor will repay the defendant owner the sum of \$1,412.00 she will be more than happy to pay to the plaintiff contractor the sum of \$113.00. If paid at all it should be paid by the plaintiff contractor to the defendant owners, as the defendant owners have already paid out the money to De Gooyer Tile and Marble, and to Holliday Lumber and Sears for tile and hardware. (See Referees report Exhibit 4-R found in Brown Envelope 42, also plaintiff contractors admission of payment 368.)

CONCLUSION:

Plaintiff contractor has paid nothing and done nothing

while admitting that the tile and hardware was obligated to be done. He makes no excuse for not doing the work only that he could have got it done for \$1,299.00. The defendant owners, because it had to be done paid out \$1,412.00 for to have the work done and the trial Court now says defendant owners you owe the plaintiff contractor \$113.00 after you have already paid out \$1,412.00.

Its Crazy.

Amount allowed = \$113.00
Should be = None

* * * * *

2. Walker Bank:

Hill Funds - \$1,012.10

EVIDENCE:

The building contract was for \$62,750.00 and there was left unspent therefrom the sum of \$1,012.10, which plaintiff contractor claims is owed to him therefrom.

CONCLUSION:

If the Court finds that the plaintiff contractor has fulfilled his obligations under the contract this money should be paid to him, however if he has not then this money should be used to defray and pay to the defendant owners to be applied on money they have had to pay out which the plaintiff contractor should have paid such as brickwork, black top, tile, electrical etc. (See Exhibit 4-R found in Referees report found in Brown Envelope 42).

Amount allowed = \$1,012.10
Should be = \$1,012.10

If plaintiff contractor is found to have completed the building contract and owes the defendant owners nothing,

otherwise money should be given to Defendant owners to partially compensate them for expenditures made.

SUMMARY

The Tile extra should not be allowed and the \$1,012.10 Walker Bank funds should be if this appeal is denied otherwise the money should be awarded to the Defendant's owners to apply on what the Defendant owners have had to pay out and which the Plaintiff's contractor should have.

STATEMENT OF POINTS

1. The decision of the Court of the Findings and Conclusions, and the Decree are not supported by the evidence.
2. That Plaintiff's contractor materially breached his contract with the Defendants owners.
3. The Court erred in not itemizing and making a finding on each item at issue, and relying and finding as a matter of fact and law that Plaintiff's recapitulation as prepared by Plaintiff's Attorney was true and correct, even as corrected thereafter by the Court.
4. That Plaintiff's wrongfully breached the contract when the money for payment was available for payment, and the funds were wrongfully used by the Plaintiff's with the result that sufficient funds were not available to pay the debts still owed under the terms of the contract.

ARGUMENT

1. The decision of the Court of the Findings and Conclusions, and the Decree are not supported by the evidence.

The Trial Court in effect disregarded nearly every contention that Defendant-owners put forward and the Statement of Facts hereto before set out ⁱⁿ detail the areas and items that

were disregarded and not considered by the Court.

2. That Plaintiff's materially breached his contract with the Defendants.

There is no question that the Plaintiff's did not finish the job on time, did not finish the job at all, took money from the loan and applied it wrongfully for favors and for himself.

3. The Court erred in not itemizing and making a finding on each item at issue, and relying and finding as a matter of fact and law that Plaintiff's recapitulation as prepared by Plaintiff's Attorney was true and correct, even as corrected thereafter by the Court.

By itemizing each item the Court could have separated those items that were under the contract and those which could be classified as an extra.

4. That Plaintiff's wrongfully breached the contract when the money for payment was available for payment, and the funds were wrongfully used by the Plaintiff's with the result that sufficient funds were not available to pay the debts still owed under the terms of the contract.

The Defendants did not at any time authorize the Plaintiff's to take loan money to pay so-called Extra's. Further the Contract for payment to the Plaintiff's did not authorize or contemplate the Plaintiff's withdrawing money for himself or any Extra's whatsoever before the contract debts were paid of a personal withdrawal of \$14,121.76 for himself. Under the Trial Courts reasoning the Plaintiff's could have paid himself the entire amount of \$62,750.82 and the Court would have sanctioned the same, leaving the Defendants to pay off the bills. If the Plaintiff's

testified, as in the case of the tile that he had recieved a lower bid, the Court would then have ordered that the Defendants pay the difference between the so-called bid and the larger amount actually paid out by the Defendants to the Plaintiff's notwithstanding the Plaintiff's had paid nothing in the first place and the Defendants owners had over paid and then the Court would have given the Plaintiff's judgement for more, the amount of over payment.

CONCLUSION

Appellants feel the record clearly shows the Trial Courts Findings and Conclusions and its Decree are not supported by believeable evidence. The Trial Court completely disregarded the plans, the Cost breakdown and in some case's the specifications, and appeared to rely solely and completely in every detail to the Referees report, notwithstanding and disregarding, Judge Snows orders concerning the same, that the Referees report was to make recommendations to the Court (See 48, 49, 90, 91, 92) and his findings questioned.

In closing Appellants cannot help but to note the following misrepresentations made by Plaintiff's.

1. Plaintiff's informed the Referee that the repaving of the cement in the basement was done after the pouring had been done, the job had been inspected and the inspector had advised that the requirements had to be changed. This information was false - the inspectors testified that they had not at any time advised or inspected the faulty cement pour, and the Plaintiff's finally admitted the mistake was not the Defendants (See 138, & 139 for this misrepresentation made by the Plaintiff's to the Referee).

2. Plaintiff's testified , with certainty, the letter of intent was entered into and the duplexes were started there-after (See 280, 281, 282, 393, 394, 395, 396, 397).

The truth is that the dates involved made it impossible for the letter of intent to be in existence at the time this Building Contract was executed on the 5th day of November 1971 (See Exhibit 1-D)

3. Testified in great depth and length that he should be paid for the mistaken cement basement pour, a 1/3 of the sewer excavation and a 1/3 of the sewer material because he put in a 6" inch sewer pipe instead of a 4" inch sewer pipe. The thruth was under law he was obligated to put in a 6' inch sewer pipe regardless of 2 or 3 duplexes. The number of duplexes made no difference. This falsehood became very apparent when the inspector testified what the law was on this matter. (See 138, 139, 275, 276, 289, 324, 325.)

Finally to put this case in proper prespective the Extra's should not be considered first or blended into the obligations due under the terms of the Basic Contract and should only be considered seperately and as proven afterwards. If this is done, and the work that was paid for by the Defendants owners was deducted from the completed buildings that the Plaintiff's contractor was obligated to finish, the facts, and buildings would be in the following condition:

1. The plaintiff's contractor would have received from the \$62,750.82 Bank loan the sum of \$61,499.64 (See total of itemized draws #1 to #51 totalling the sum of \$61,499.64 set forth on pages 1 and 2 of Referees Exhibit 2-R found in brown enevelope marked 42), and included in

that \$61,499.64, Plaintiff's retained personally the sum of \$14,121.76 which he claimed as wages due him (although Defendants never contracted to pay him wages) the sum of \$5,592.00 as wages and the sum of \$8,529.76 was because he was entitled to take this money because he acted as a contractor. (See 358, 364, 389.).

2. The buildings would be without (See admitted payments made by the defendants set out in Exhibit 4-R of Referees report found in brown envelope marked 42 and Plaintiff's admission of Plaintiff's that Defendants did pay for the same. (See also 368.) the followings:

1. No brick on the outside of completely buildings, and without fireplaces.
2. Without Blacktop.
3. Without tile work and bathroom hardware.
4. Without formica.
5. Without electrical wiring.
6. Without a fence.
7. Without full carpeting in one duplex because failed to pay for the laying of the same.
8. Without any painting thereof inside or outside.
9. Without foundation plastered and finished.
10. Without the property being graded.

ALSO

1. The buildings would be without a shingled roof and would have as they now have asphalt roofs.
2. Without Visqueen under basement as now.

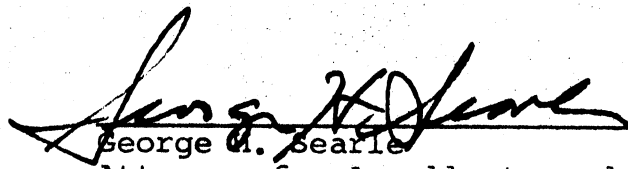
ALSO

Because the Plaintiff's contractor failed to finish he did not do the following, and the buildings would be without:

1. Without Visqueen protection in basement as now.
2. Without storm doors.
3. Without Gutters or Downspouts
4. Without one sump drain.
5. Without shutters for windows.

The fact that the Plaintiff's contractor may be entitled to some Extra's, does not justify the foregoing breach of contract or excuse his non-payment for the same after milking the sum of \$14,121.76 from the Bank Loan Money, especially when the Cost breakdown provided an estimated \$3,000.00 a unit would be labor pay for each \$31,375.41 duplex built. (See Exhibit 2-D (Labor)) which is a reasonable amount of nearly 10% on the entire job plus savings realized in profit costs from the estimate cost thereof on the Brick work of \$3,030.00; the painting of \$2,400.00; and carpeting of \$2,167.00 to mention only three items of savings on the estimated cost breakdown made up and given by Plaintiff's in this matter.

Respectfully submitted this
17th day of November, 1975.


George W. Searle
Attorney for Appellants and
Defendants
2805 South State Street
Salt Lake City, Utah 84115

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