

1986

Hendricks v. Interstate Homes : Brief of Appellant

Utah Supreme Court

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BRIEF

DOCKET NO. 860094 IN THE SUPREME COURT OF THE
STATE OF UTAH

BILL G. HENDRICKS, d/b/a
DESERET ROOFING COMPANY,

Plaintiff and
Respondent,

vs.

INTERSTATE HOMES, INC., et.
al.,

Defendants and
Appellants.

No. 2-0420

BRIEF OF APPELLANT

Appeal from the Summary Judgment of
The Third Judicial District Court of
Salt Lake County, State of Utah
The Honorable James S. Sawaya, Judge

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FILED
MAR 26 1985

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE
STATE OF UTAH

BILL G. HENDRICKS, d/b/a)	
DESERET ROOFING COMPANY,)	
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Plaintiff and)	
Respondent,)	
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LIST OF ALL PARTIES

Bill G. Hendricks, d/b/a Deseret Roofing Company	Respondent; Plaintiff, Third-Party Plaintiff (C84-2993); Defendant (C84-3471)
Interstate Homes, Inc.	Appellant; Defendant (C84-2993)
Franz C. Stangl III	Defendant (C84-2993)
Elizabeth Ann Stangl	Defendant (C84-2993)
Nebraska Savings and Loan Association, F.A.	Defendant (C84-2993)
Empire Land Title, Inc.	Defendant (C84-2993)
John Does I-XX	Defendant (C84-2993)
Owens-Corning Fiberglas Corporation	Third-Party Defendant (C84-2993); Plaintiff (C84-3471)
F. C. Stangl Construction Company	Defendant (C84-3471)

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the trial court reviewed the evidence before it in the light most favorable to the defendant as required by Utah law.

2. Whether summary judgment can be granted when there exists a non-frivolous, compulsory counterclaim which greatly exceeds the amount of relief sought by the plaintiff.

3. Whether Hendricks had a contractual duty to ensure that the correct materials were in fact delivered by Hendricks' supplier (Owens-Corning), and whether material issues of fact exist as to the presence and fulfillment of such a duty.

4. Whether the trial court erred by disallowing parol evidence, i.e., the deposition and affidavit of Rolf Kuepper, to determine whether the inter-office memorandum was a final integrated agreement; and therefore, whether the statements in the affidavit and deposition created an issue of fact sufficient to preclude summary judgment of that issue.

STATEMENT OF THE CASE

Plaintiff commenced this litigation by filing a Complaint to enforce a mechanic's lien. Record at 2-16. Defendant Interstate Homes counterclaimed, seeking recovery for damages arising out of plaintiff's breach of contract. Record at 27-32. Upon Stipulation and Order, the mechanic's lien was released and venue was transferred to the Third Judicial District. Record at 85. Subsequently, the plaintiff filed a

Third-Party Complaint against Owens-Corning, the supplier of the roofing materials in question. Record at 94-98. Thereafter, Owens-Corning filed a Complaint against the plaintiff and the owner, F. C. Stangl Construction Company (one of the defendants), seeking payment for the roofing materials, which were delivered at the instance and request of the plaintiff. See Third District Court Complaint No. C84-3471, included in Addendum at Item "H". The two cases were consolidated by Order of the Court dated November 2, 1984. Record at 123, 124.

The Plaintiff's Motion for Summary Judgment was argued before the Honorable James S. Sawaya on November 26, 1984. An Order and Summary Judgment was granted in favor of the plaintiff on December 13, 1984 awarding principal, interest, costs and attorney's fees on the Complaint, and dismissing the defendants' Counterclaim. Record at 165-167, 180-183. The Third-Party Complaint and the Owens-Corning Complaint were left standing.

STATEMENT OF FACTS

Franz C. Stangl III is the owner and general contractor of a motel located in Price, Utah. Interstate Homes, Inc., a modular building manufacturer, was the primary contractor employed to build the motel. Kuepper depo. 8-9.

Bill G. Hendricks d/b/a Deseret Roofing Company is a roofing contractor. On or about April 13, 1983, after continuing negotiations, Hendricks presented a proposal to furnish and install a twenty (20) year roof to Evans Products Company's speci-

fications G3-UP20-W for \$19,500.00. Plaintiff's Ex. 1, Kuepper depo., included in Addendum at Item "A". That proposal was accepted together with the Building Specifications. Plaintiff's Ex. 2, Kuepper depo. 11-23.

The proposal, prepared by plaintiff, specifically states:

"Deseret Roofing Company (DRC) to furnish the felt and nails in the amount they would normally use for area involved. DRC is not responsible for damage to the base felt at customer's plant, in transport or during assembly of the modules in Price."

Pursuant to the Building Specifications, plaintiff was to provide all roofing materials. Plaintiff's Ex. 3, Building Specifications, Paragraph 5 Roofing, Kuepper depo.

Paragraph 5(c) of the Building Specifications specifically provides:

"All areas of roof without shingles shall be dried in to render the building weather-tite."

Plaintiff ordered the felt materials from Owens-Corning. The materials, consisting of 60 rolls Type 28 Bondable Base were delivered to the Interstate's factory and the billings were sent directly to plaintiff for payment. Plaintiff's Ex. 4, Kuepper depo.; Interstate Homes' production line employees installed the felt material. The first 60 rolls were insufficient to finish the modular units, however, and consequently, plaintiff ordered an additional 18 rolls of felt material which was also installed by Interstate Homes' employees. Kuepper depo. 23-24.

The modular units were then transported to Price, Utah. Shortly thereafter, around June 8, 1983, a rainstorm occurred. Kuepper depo. 24. During the storm, substantial amounts of water penetrated the felt material causing severe damage to the interior of the buildings in the approximate sum of \$52,000.00. Kuepper depo. 69-70.

Shortly after the rain damage was discovered, plaintiff, representatives of Interstate Homes, and their insurance carriers met at the site to assess the damage and the cause thereof. Kuepper depo. 68-69. It was determined that the water damage occurred in only those areas where the final 18 rolls of felt were installed. This felt was subsequently identified as Type IV Ultra Ply. Kuepper depo. 28-35, Ex. 4-5.

Plaintiff completed the roofing on the job site at Price, Utah. At the time the roofing was to be done, Mr. Hendricks' secretary, Colleen, called Mr. Kuepper requesting a memo to the effect that Deseret would get paid if they did the on-site work. Mr. Kuepper did in fact, sign such a memo dated June 14, 1983. See plaintiff's Ex. 7, Kuepper depo.

However, plaintiff's insurance company refused to pay Interstate's claim for water damage so Interstate refused to pay the \$19,500.00 bill until the insurance claim was resolved.

Plaintiff did not pay the \$9,912.11 (which was included in the \$19,500) due and owing for materials claimed by Owens-Corning.

The impasse among the parties resulted in this litigation.

SUMMARY OF ARGUMENT

Summary Judgment may only be granted when, based on the evidence before the court, it is shown that no genuine issues of material fact exist, and that the moving party is entitled to judgment as a matter of law.

The mere existence of defendant Interstate Homes' compulsory counterclaim, which seeks relief in approximately twice the amount of that sought by plaintiff, in and of itself precludes the granting of summary judgment. Moreover, the counterclaim raises specific issues of fact as to whether plaintiff fulfilled his contractual duty to furnish waterproof base felt, which issues of fact have yet to be resolved.

The lower court also erred by ruling that the parol evidence rule barred certain portions of the deposition and Affidavit of Rolf Kuepper regarding an inter-office memorandum. The testimony was properly before the court; it created an issue of fact concerning an alleged "agreement" by Interstate Homes to pay plaintiff despite the damage claims arising from plaintiff's breach of contractual duty. The factual issues raised in Kuepper's testimony proscribe summary judgment in this matter.

ARGUMENT

- I. ALL DOUBTS AND INFERENCES SHOULD HAVE BEEN, AND OUGHT TO BE, RESOLVED IN FAVOR OF APPELLANT HEREIN

This Court has recently reaffirmed the strict requirements of U.R.C.P. 56 in Frisbee v. K & K Constr. Co., 676 P.2d

387, 389 (Utah 1984), stating:

"Rule 56(c) of the Utah Rules of Civil Procedure provides that summary judgment is proper only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. It should be granted only when it clearly appears that there is no reasonable probability that the party moved against could prevail. As this Court explained the standard [in Bowen v. Riverton City, 656 P.2d 434 (Utah 1982)]:

Summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment."

As will be seen in the argument that follows, the lower court failed to apply the requirements of Frisbee and Bowen.

II. THE EXISTENCE OF DEFENDANT'S COUNTERCLAIM BARS SUMMARY JUDGMENT

As a general rule, the mere existence of a counterclaim does not, in and of itself, preclude summary relief. However, when the counterclaim is not frivolous, but is predicated upon a good and substantial cause, it may bar summary judgment. Bennion v. Amoss, 500 P.2d 512, 516 (Utah 1972). Furthermore, the presence of such a counterclaim is an "insuperable objection to summary judgment" where it is in excess of the amount demanded in the complaint. Annot., 8 A.L.R. 3d 1361, 1378 (1966); 73 Am.

Jur. 2d Summary Judgment §31 (1974).

The counterclaim in the present matter seeks not only an offset to the plaintiff's complaint, but relief far in excess of that prayed for by plaintiff. It is a compulsory counterclaim in that "it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" under U.R.C.P.

13(a). It is neither sham nor frivolous, but is an attempt to recover amounts actually spent in repairing real and substantial damage, which damage was caused by the failure of the plaintiff to supply materials in conformance with contract specifications. The counterclaim attempts to protect substantial rights of the defendant, and raises material factual issues which prohibit summary judgment. See generally, Parmelee v. Chicago Eye Shield Co., 157 F.2d 582 (8th Cir. 1946), included in Addendum at Item "I".

III. THE DISAGREEMENT OVER THE EXTENT OF PLAINTIFF'S
DUTY TO ENSURE THAT THE PROPER MATERIALS WERE
DELIVERED PRECLUDES SUMMARY JUDGMENT

Plaintiff, in the lower court, claimed that its duty was absolved because it "had no knowledge of the mistaken delivery" of the 18 rolls of non-complying felt. Defendant, on the other hand, contended that plaintiff had not only a duty to supply materials, but an additional duty to ensure that the materials supplied met contract specifications. The plaintiff was not justified in his attempt to shift this duty to the defendant.

In Kidman v. White, 378 P.2d 898, 900 (Utah 1963), this Court referred to a similarly disparate view of the meaning of a

contract between the two parties involved, and reversed the summary judgment, stating:

"That both parties hereto make plausible arguments that the contract in question is so manifestly in their favor that reasonable minds could not see it the other way is a pointed commentary of the ability of the human mind to rationalize in its own interests. It is equally so upon the desirability and the propriety of resolving any doubts in favor of permitting courts and juries to settle such disputes rather than ruling upon them summarily as was done here."

The policy stated in Kidman must be afforded even greater weight, where, as here, the summary judgment will not only grant the relief prayed for by plaintiff, but will completely preclude the relief sought by defendant's counterclaim.

IV. ISSUES OF FACT EXIST AS TO WHETHER DEFENDANT, BY INSTALLING THE NON-CONFORMING MATERIALS, ABSOLVED PLAINTIFF'S DUTY TO SUPPLY THE PROPER MATERIALS.

Plaintiff agreed, by contract, to supply the roofing materials in question. Defendant's only duty was to properly install those materials upon delivery. Defendant had no duty to ensure that the second shipment of base felt was the same as the first. Additionally, issues of fact exist as to whether defendant's employees could have recognized the non-conforming materials even if such a duty existed. Rolf Kuepper, in his deposition, pointed out that it would be nearly impossible to distinguish the two felts supplied.

"Q: What about the Ultra Ply? Is the roll the same weight as the base material?

A: They are about the same size roll. I bet when they are shipped they are within pounds of each other. You just get more material per roll on this than you do on this.

Q: I am having trouble -- First of all, are they the same color?

A: Yes.

Q: Both of them black?

A: Yes.

Q: Any other visual differences in the two?

A: I don't know. I would say that there might be to the factory rep or something. I don't recall. Maybe one has a little tiny stripe or something through it, I don't know. But essentially, no. The difference between 43-pound and 30-pound is so minute, really. Until you hold a sample of each, one in one hand and one in the other and feel the two and then hold them to the light against some backlighting, visually hold them it is pretty tough to tell."

See deposition of Rolf Kuepper, P. 66 lines 19-25, P. 67 lines 1-12.

Such issues of fact clearly preclude the granting of summary judgment in this case.

V. THE DEPOSITION AND AFFIDAVIT OF ROLF KUEPPER
RAISES AND ISSUE OF MATERIAL FACT CONCERNING
THE INTER-OFFICE MEMORANDUM.

Plaintiff, in the lower court, relied heavily on a written memorandum which plaintiff claims constituted an "estoppel, waiver, accord and satisfaction or modification of contract." Record at 115. Plaintiff argued that the testimony of Kuepper (reprinted below) which modifies the language of the memorandum, was parol evidence and as such could not be used to create an issue of fact upon which summary judgment must fail.

Defendant agrees that parol evidence cannot be used to contradict the unambiguous language of an integrated agreement. However, the memorandum at issue here, is not "integrated" and

therefore Kuepper's sworn testimony can be used to create issues of material fact.

At the very least, the trial court was required to examine the deposition and affidavit, and other available extrinsic evidence, to determine whether an integrated agreement existed. Refusal to do so constitutes reversible error. In Bullfrog Marina, Inc., v. Lentz, 501 P.2d 266, 270 (Utah 1972), this Court, in stating that parol evidence could not be introduced to vary the terms of an integrated agreement, said the following:

"The foregoing principle is correct when applied to an integrated contract. The issue of this action is whether the lease represented a final and complete expression of the agreement of the parties or was merely a written memorandum by which part of the contract may be proved.

Section 28, Restatement, Contracts, states:

An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted.

Comment a. of Section 228 explains that integrated contracts must be distinguished from written memoranda by which contracts may be proved. An essential element of an integration is that the parties shall have manifested assent not merely to the provisions of their agreement but to the writing or writings in question as a final statement of their intentions as to the matters contained therein. Whether a document was or was not adopted as an integration may be proved by any relevant evidence.

Whenever a litigant insists that a writing that is before the court is an integration and asks the application of the parol evidence rule, the court must determine as a question of fact whether the parties did in fact adopt a particular writing or writings

as the final and complete expression of their bargain. In determinng the issue of the completeness of the integration in writing, evidence extrinsic to the writing itself is admissible. Parol testimony is admissible to show the circumstances under which the agreement was made and the purpose for which the instrument was executed." All Emphasis added.

Kuepper's deposition explains the purpose for the memorandum as follows:

Q: Did you discuss the time frame for payment to Hendricks upon completion?

A: Yes. At one point subsequent to our conversation, Bill's and mine, regarding the fact that the insurance company would take care of the claim for the damage, Bill had Colleen call me up, who is his secretary, and say, "Bill would like to have from you a memo stating that you will pay for the job that needs to be done down there."

I said, "Why?" or something like that.

At any rate, I said to her, "Okay, based on the fact that he has committed to us or to me that his insurance company would take care of the claim, I will give him a memo."

Q: You were aware then that he wanted some kind of assurance that he was going to get paid pursuant to the original agreement; i.e., upon completion?

A: Yes.

Q: Before going ahead and doing the rest of the job?

A: Yes.

MR. BATTLE: We might as well introduce this memo while we are talking about it.

(Plaintiff's Exhibit No. 7
marked for identification.)

Q: (BY MR. BATTLE) You say that Colleen called you and asked you for a memo to the effect that we have already discussed. I ask you if Exhibit 7 is an accurate reflection of the memo that was, in fact, sent.

A: It was the memo that was sent to Bill.

Q: I take it you told her over the phone the same thing that is contained in that memorandum, the same information was conveyed orally to Colleen over the phone by you?

A: Not exactly. This says that I confirmed to her that payment on this job will not be affected by insurance claim in progress. That was an abbreviation of both what I said to her and to Bill and my understanding. My understanding in reality was that payment on the job would not be held up pending the settlement of the claim but that the insurance company would take care of the claim. That is the part I failed to note in here.

Kuepper depo. 46, 47.

Mr. Kuepper also swore out an affidavit containing similar testimony. See Addendum, Item "D".

The testimony clearly indicates that there was no assent to the memoranda as a final statement of the parties' intentions. The inter-office memorandum was, therefore, not an integrated agreement, and the testimony of Mr. Kuepper created an issue of material fact upon which the lower court should have denied summary judgment.

CONCLUSION

Appellant seeks reversal of the judgments in all respects. The appellant should be granted a trial on the merits to determine whether the plaintiff was entitled to any payments whatsoever under his mechanics lien (including principal, interest, court costs and attorney's fees), and whether the defendant should be allowed to recover the losses set forth in its compulsory counterclaim. As part of the trial it should also be determined what, if any, contribution should be made

by Owens-Corning in the event they are found to be liable under the Third-Party Complaint.

DATED This 26th day of March, 1985.

BEASLIN, NYGAARD, COKE & VINCENT



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ADDENDUM

Deseret Roofing Company Bid	Item "A"
Building Specifications	Item "B"
(Roofing Portions only)	
Inter-Office Memorandum	Item "C"
Affidavit of Rolf Kuepper.	Item "D"
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U.R.C.P. 13.	Item "J"
U.R.C.P. 56.	Item "J"

MOTEL PROJECT - PRICE, UTAH

**INTERSTATE HOMES
200 North 500 West
Mo. Salt Lake, Utah**

**DESERET ROOFING COMPANY
3957 South Main Street
Salt Lake City, Utah 84107
March 21, 1983**

Customer Preparation: As modules are built in customer's plant, the base felt is to be nailed in place in accordance with Evans' specifications by customer's personnel. Deseret Roofing Company (DRC) to furnish the felt and nails in the amount they would normally use for area involved. DRC is not responsible for damage to the base felt at customer's plant, in transit or during assembly of the modules in Price. Customer to furnish and temporarily install pipe jacks.

Standard Pitch Roofs: DRC will furnish and install OC twenty (20) year limited warranty fiberglass shingles in accordance with manufacturer's specifications. Standard galvanized rake metal at gables. Color black, red or gray. Valleys to be granulated cap sheet to match the shingles.

Low-Pitch Roofs: DRC will furnish and install a twenty (20) year specification tar and gravel built-up roof to Evans Products Company's spec G3-UP20-W. Surfacing to be red lava rock, slag or regular pea gravel. Standard galvanized gravelstop at edges.

WARRANTY: Two (2) Year contactor's warranty on workmanship; twenty (20) year OC warranty on shingles.

PRICE: ^{\$19,500.00 high - RKL}
~~\$21,200.00~~ with slag surface or regular gravel.
^{\$20,700.00 high RKL}
~~\$22,400.00~~ with red lava rock surface.

TERMS: Cash upon completion. Interest @ 2% per month from date of invoice will charged if not promptly paid.

ACCEPTED: Roy H. Kupper **DATE:** 4-13-83

NOTE: This bid is good until March 31, 1983. (8% material increase scheduled.)

ITEM "A"

BUILDING SPECIFICATIONS

FOR A

94 UNIT MOTEL COMPLEX

FOR

F.C. STANGL

PRICE, UTAH

PREPARED BY

INTERSTATE HOMES, INC.

500 WEST 200 NORTH

NORTH SALT LAKE, UTAH

MARCH 22, 1983

MARKED UP COPY BY King.

But's correction in it

ITEM "B"

ROOFING

- A. Shingles: Owens Corning Classic Plus fiberglass shingles. Underwriters' Laboratories Class A fire rating. 220 pounds per square approximate weight. Meets A.S.T.M. Spec.03018-72 Type I. Fed. Spec SS-S-294-A. Shingles shall be installed as per U.B.C. Section 3203 (e)5 so that there are not less than two thicknesses at any point.

ITEM "B"

B. Underlayment: 15# roofing felt.

C. Eave Flashing: 26 ga. Galvanized iron.

Shingles shall be installed only on gables. All other roofing to be built up roofing done onsite. All areas of roof without shingles shall be dried in to render the building weather-tite. All finish roofing materials shall be installed by onsite contractor.

D. Gravel Surfaced Roof System

1. Product Handling, Storage and Delivery

- a. Products. Materials shall be THE FLINTKOTE COMPANY or equal brands delivered in original packages bearing manufacturer's labels.
- b. Storage of Materials. Store all roofing materials, coatings and miscellaneous accessories off ground completely protected against weather.

2. Warranty

- a. Roof Membrane Limited Warranty. The Roofing Contractor will issue a Roof Membrane Limited Warranty on the roofing membrane.

3. Roofing System

- a. Built-up Roof on Wood Decks. On areas indicated on drawings as built-up roof, apply AAA-4-1 Roof System, with BF-1 Base Flashing and Approved Metal Counter-flashing as specified in the 1981 edition of THE FLINTKOTE COMPANY Specification Manual. Roof shall be applied by a Roofing Contractor approved by THE FLINTKOTE COMPANY.
- b. Summary of Materials per 100 Square Feet

Glasbase Base Sheet (1 ply type 4 + 2 PLIES TYPE 4)	75 lbs.
Type III Asphalt Moppings (2 @ 25 lbs. ea.)	50 lbs.
*Flood coat of Type III Asphalt	60 lbs.
Gravel surfacing (or slag)	400 lbs.
Approximate Total Finished Weight	585 lbs.

*For decks with a slope of 1/4" in 12" or less, use Type I asphalt for flood coat. (Except desert areas.)
- c. Asphalt. Apply asphalt at a temperature between 400 and 450 degrees F. Flood coat shall be applied to provide a coating of uniform thickness.

ITEM "B"

- d. Cants. In angles of roof deck and vertical surfaces, the Roofing Contractor shall furnish and install a FiberCant Strip with a minimum 3" face.
- e. Gravel or Slag. Surfacing shall be opaque, clean and thoroughly dry. Gravel shall be a 50-50 ratio 4-5 screen crush, 1/4" to 1/2": slag shall be 1/4" to 5/8" in size.

4. Inspection of Surfaces

- a. Roof Deck. Roof deck shall be smooth, dry, clean and securely nailed. Cover large cracks with metal. Properly grade surfaces to outlets. Roof accessories shall be available before Roofing Contractor begins his work.

5. Preparation

- a. Sheet Metal Work. All metal flashings shall be factory primed or primed with asphalt primer and allowed to dry before roofing materials are applied.
- b. Cants. Nail cants 2' o.c. to roof deck. The cants shall fit flush at ends and to vertical surfaces. Where scuppers occur, apply cant 2" back from flange and bevel cant 8" from ends.

6. Application

- a. Outlets. Set base ply at drains in flashing compound 9" wide around ring and flange. After membrane is applied, and while hot, install clamp ring and tighten.
- b. Valleys. Reinforce valleys with an additional ply of ~~base sheet~~ 36" wide, extending 12" up inclines. Apply in direction of slope of valley, lapping 4" on ends. Solid mop to base ply.
- c. Vent Pipe and Flashing Pan. Where projections extend through the roof surface, install flashing with a 4" wide continuous flange. Set flange in flashing compound on base ply. (For nailable surfaces, flange must also be nailed 3" o.c. 3/4" from perimeter). Seal flange with a 6" wide strip of YELLOW JACKET Glass Fabric, set in asphalt. Follow with a collar of base ply to fit around vents and overlap flanges 6" on all sides, applied in asphalt. After membrane is applied, form a cant of flashing compound around the base. Flashing Pan shall have a minimum 4" level height. Opening between projection and deck shall be closed to prevent drippage. Fill the inside of the collar with

ITEM "B"

flashing compound. Cant the flashing compound around projection above the level of outside rim. (Flashing Pans are not suitable for hot pipe projections.)

- d. - Roofing Membrane. Cut plies in lengths not to exceed 18' and allow to flatten. Longer lengths may be used when rolled or machined and broomed into place. Apply base ply lapping 2" on sides. Attach base ply at side laps 9" o.c. and 18" o.c. staggered in two rows 12" from each edge with Approved Fasteners. Solid mop base ply with asphalt and embed two additional plies, shingle method, lapping 19" on sides, mopping between plies. All end laps shall be 4" and not less than 3' apart, diagonally staggered. (All side and end laps of each ply shall be staggered and offset from preceding plies.)
- e. Base Flashings. Over the completed membrane at vertical surfaces, install Base Flashings consisting of one ply of Base Sheet and one ply of FLINTGLAS Cap Sheet, applied in asphalt. Nail top edge 9" o.c. through tin discs. Apply a three-course Flashing System to concrete or masonry walls.
- f. Final Surfacing. GRAVEL OR SLAG. After all plies are installed, apply a flood coat of asphalt and embed the gravel surfacing. Roofing System shall be installed in a continuous application.

ITEM "B"

MEMORANDUM

JOE LICHTIE

Date JUNE 14, 1983
(9:30 A.M.)

ROLF KUEPPER

ROOFERS - PRICE MOTEL

FROM COLLEEN AT DESERET (266-1601) THEY NEED TO FINISH UP A JOB
THEY ARE ON - WILL BE ON PRICE JOB THURSDAY & WORK THROUGH
WEEKEND.

CONFIRMED TO HER THAT PAYMENT ON THIS JOB WILL NOT BE AFFECTED
BY INSURANCE CLAIM IN PROGRESS.

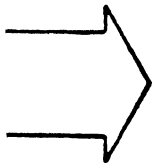
CONCERNING COMMITMENT TO HAVE MAN ON JOB YESTERDAY TO CHECK DRY-IN,
SHE STATED THAT THEY DID NOT HAVE ANYONE TO SEND. I TOLD HER THAT
WE WOULD MONITOR THE DRY-IN AND IF ADDITIONAL COSTS ARE INCURRED
WE WILL ADD TO INSURANCE CLAIM.

Rolf

PL/DEFT EXHIBIT	17
WIT.	P. K. ...
DATE	7-1-83
MOBYN HAYNIE, REPORTER	

CC: MR. BILL HENDRICKS,
DESERET ROOFING

Copies: _____



INTERSTATE HOMES, INC. 1840 SOUTH 700 WEST, SALT LAKE CITY, UTAH 84104

ITEM "C"

HENRY S. NYGAARD, ESQ.
BEASLIN, NYGAARD, COKE & VINCENT
Attorneys for Defendant Interstate Homes
333 North 300 West
Salt Lake City, UT 84103
Telephone: 328-2506

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

BILL G. HENDRICKS, d/b/a)
DESERET ROOFING COMPANY,)
)
Plaintiff,)
)
vs.)
)
INTERSTATE HOMES, INC., FRANZ)
C. STANGL III, ELIZABETH ANN)
STANGL, NEBRASKA SAVINGS AND)
LOAN ASSOCIATION, F.A., EMPIRE)
LAND TITLE, INC., a Utah Corp-)
oration, and JOHN DOES I - XX,)
)
Defendants.)

COUNTER AFFIDAVIT OF
ROLF KUEPPER

BILL G. HENDRICKS d/b/a)
DESERET ROOFING COMPANY,)
)
Third-Party Plaintiff,))
)
vs.)
)
OWENS-CORNING FIBERGLAS)
CORPORATION,)
)
Third-Party Defendant.))

Civil No. C84-2993
Honorable James S. Sawaya

OWENS-CORNING FIBERGLAS)
CORPORATION,)
)
Plaintiff,)
)
vs.)
)

BILL G. HENDRICKS d/b/a)
DESERET ROOFING COMPANY and)
F. C. STANGLE CONSTRUCTION)
COMPANY, a corporation,)

Civil No. C84-3471
Honorable Scott Daniels

Defendants.)
)

STATE OF UTAH)
County of Salt Lake) ss.

I, Rolf Kuepper, being first duly sworn, depose and say:

1. I am a resident of Salt Lake County, State of Utah, and over the age of 21 years.

2. I am presently employed by Quality Inns International. Prior to my employment with Quality Inns, I was employed with Interstate Homes who is now wholly owned by U. S. Home.

3. I worked for Interstate Homes between February 26, 1976 and September 1, 1983.

4. As part of my employment I became acquainted with Bill G. Hendricks who was the proprietor of Deseret Roofing Company.

5. On April 13, 1983, I executed a bid document prepared by Interstate Homes and Deseret Roofing Company dated March 21, 1983. The bid document provided that Deseret Roofing Company would be paid \$19,500.00 for labor and materials in installing a 20 year roof and as part of the bid, Deseret Roofing Company was to furnish the base felt materials and nails to be used on the roof.

ITEM "D"

6. Bill Hendricks was aware that the felt was to be installed by production line workers employed by Interstate Homes and not roofing craftsman.

7. The roof was to be installed in accordance with building specifications dated March 22, 1983, which were approved and accepted by Bill Hendricks. The plans and specifications specifically provided that Deseret Roofing Company would provide temporary dry-in materials that would render the building "weather tite".

8. Deseret Roofing Company through Bill Hendricks ordered felt from Owens-Corning Fiberglas. The products were in fact delivered to Interstate Homes and were installed by employees of Interstate Homes.

9. During the course of production there was not an adequate supply of felt. Bill Hendricks ordered an additional 18 rolls of felt which were subsequently delivered to Interstate Homes and used in completing the felt covering.

10. Interstate Homes then delivered the module units to Price, Utah after the felt had been placed in position.

11. A short time after the delivery of the modules to Price there was a rainstorm on June 8, 1983. Water penetrated the felt that was included in the last 18 rolls causing damage to the interior of the buildings in the sum in excess of \$50,000.00.

12. Shortly after the leak was discovered, there were

ITEM "D"

meetings for the purpose of correcting the problems. Those who were present were Bill Hendricks, Joe Lichtie of Interstate Homes, Randy Erwin and Morris Quarnberg of Quality Enterprises, Jim Dickson, the insurance adjuster for Interstate Homes and Don White, insurance adjuster for Deseret Roofing Company. Shortly after these meetings I had a conversation with Bill Hendricks and with his secretary, Colleen, relative to Deseret Roofing completing the roof. Colleen requested: "Bill would like to have from you a memo stating that you will pay for the job that needs to be done down there." Based on that request I did in fact, because of the urgency of the situation, prepare a memo dated June 14, 1983, stating in part "Confirmed to her that payment on this job will not be affected by insurance claim in progress."

13. At the time that I prepared this memo it was clearly my understanding with Bill Hendricks that his claim with his insurance carrier would be honored and that both of us would be paid for the work for damages arising out of this particular project and the rain damage.

14. The insurance carrier representing Deseret Roofing Company did not pay the claim of Interstate Homes and Interstate Homes did not pay the \$19,500.00 claim of Deseret Roofing Company.

15. I was not aware of any approved extras for labor and materials on this particular project.

DATED This 14 day of November, 1984.

Rolf Krepper

SUBSCRIBED AND SWORN TO Before me this 14 day of
November, 1984.

Henry S. Haggard
Notary Public
Residing at: North Lake City, Utah

My Commission Expires:

May 5, 1992

ITEM "D"

STATE OF UTAH)
) SS:
County of Salt Lake)

LINDA L McGRATH, being duly sworn, says:

That she is employed in the offices of Beaslin, Nygaard, Coke & Vincent, attorneys for defendant Interstate Homes, Inc., herein; that she served the attached Counter Affidavit of Rolf Kuepper upon the following individuals by placing a true and correct copy thereof in an envelope addressed to:

Mr. Robert A. Burton
Strong and Hanni
Sixth Floor Boston Building
Salt Lake City, UT 84111

W. Cullen Battle
Fabian & Clendenin
Twelfth Floor
215 South State Street
Salt Lake City, UT 84111

Kent Shearer, Esq.
Shearer & Carling
1000 Continental Bank Bldg.
Salt Lake City, UT 84101

and depositing the same, sealed, with first-class postage pre-paid thereon, in the United States mail at Salt Lake City, Utah, on the ^{19th}~~16th~~ day of November, 1984.

Linda L. McGrath
Linda L. McGrath

Subscribed and sworn to before me this ^{19th}~~16th~~ day of

ITEM "D"

November, 1984.

Carlynn S. Cooksey
Notary Public
Residing at Salt Lake City, UT

My Commission Expires:

6-22-86

ITEM "D"

County of Salt Lake - State of Utah

FILE NO. 084-2993
084-3471

E: (✓ PARTIES PRESENT)

COUNSEL: (✓ COUNSEL PRESENT)

Bill G. Hendricks : W. Cullen Battle
: Robert A. Burton
Interstate Homes, Inc., et al : Henry Nygaard
: Kent Shaver.

CLERK

REPORTER

BAILIFF

HON.

DATE:

J. Sowers

JUDGE

11-26-84

Matter heard -

1. Plaintiff's motion for S.J. against
def't. Interstate Homes.

Order of the Court -

Plaintiff is entitled to summary
judgment as prayed for upon the
grounds and for the reasons stated
in his memoranda in support
of said motion.

R. S.

ITEM "E"

Opinion to counsel -

PAGE 1 OF 1

W. Cullen Battle, A0246
FABIAN & CLENDENIN
Attorneys for Plaintiff
Twelfth Floor
215 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 531-8900

Robert A. Burton, #0516
STRONG & HANNI
Attorneys for Plaintiff
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

BILL G. HENDRICKS, d/b/a)
DESERET ROOFING COMPANY,)
)
Plaintiff,)
)
vs.)
)
INTERSTATE HOMES, INC., FRANZ)
C. STANGL III, ELIZABETH ANN)
STANGL, NEBRASKA SAVINGS AND)
LOAN ASSOCIATION, F.A., EMPIRE)
LAND TITLE, INC., a Utah Corp-)
ation, and JOHN DOES I-XX,)
)
Defendants.)

J U D G M E N T

Civil No. C84-2993

Honorable James S. Saw

BILL G. HENDRICKS d/b/a)
DESERET ROOFING COMPANY,)
)
Third-Party Plaintiff,)
)
vs.)
)
OWENS-CORNING FIBERGLAS)
CORPORATION,)
)
Third-Party Defendant.)

ITEM "F"

OWENS-CORNING FIBERGLAS CORPORATION,)	
)	
Plaintiff,)	Civil No. C84-3471
)	
vs.)	(Consolidated with C84-299)
)	
BILL G. HENDRICKS d/b/a)	
DESERET ROOFING COMPANY and)	
F. C. STANGLE CONSTRUCTION)	
COMPANY, a corporation,)	
)	
Defendants.)	

Plaintiff's motion for summary judgment seeking a dismissal of the counterclaim filed by defendant Interstate Homes, Inc. came on for hearing before the Honorable James S. Sawaya, one of the judges of the above-entitled court, on November 26, 1984, at 2:00 P.M. Plaintiff was represented by his attorneys Robert A. Burton and W. Cullen Battle. Defendant Interstate Homes, Inc. was represented by its attorney, Henry Nygaard. Third-Party Defendant Owens-Corning Fiberglas Corporation was represented by its attorney, Kent Shearer. The court having reviewed the memoranda, affidavits and file, heard arguments of counsel, being fully advised, and having determined there are no genuine issues of material fact and that plaintiff is entitled to judgment as a matter of law, and with good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

(1) The counterclaim of Interstate Homes, Inc. against plaintiff Bill G. Hendricks d/b/a Deseret Roofing Company be and hereby is dismissed with prejudice.

(2) There is no just reason for delay and the entry of final judgment is hereby directed.

(3) Plaintiff Bill G. Hendricks d/b/a Deseret Roofing

ITEM "F"

Company is granted judgment on the counterclaim in his favor as against defendant Interstate Homes, Inc., no cause of action.

Dated this _____ day of December, 1984.

BY THE COURT:

Approved as to form:

J U D G E

Henry S. Nygaard
Henry S. Nygaard
Attorney for Plaintiff

ITEM "F"

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

PATSY WYATT, being duly sworn, says:

That she is employed in the offices of Strong & Hanni,
Attorneys for Plaintiff Bill G. Hendricks d/b/a Deseret Roofing Co.
herein; that she served the attached Judgment

upon all counsel

by placing a true and correct copy thereof in an envelope addressed
to:

Henry S. Nygaard
Attorney for Defendant Interstate Homes
333 North 300 West
Salt Lake City, Utah 84103

W. Cullen Battle
Fabian & Clendenin
Twelfth Floor
215 South State Street
Salt Lake City, Utah 84111

Kent Shearer
Shearer & Carling
Attorneys for Owens-Corning Fiberglas Corp.
1000 Continental Bank Bldg.
Salt Lake City, Utah 84101

and depositing the same, sealed, with first class postage prepaid
thereon, in the United States mail at Salt Lake City, Utah, on
the 3rd day of December, 1984.

Patsy Wyatt

Subscribed and sworn to before me this 3rd day of

December, 1984.

My commission expires:

5/13/85

Therese K. Webster
Notary Public
Residing at Salt La

ITEM "F"

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

BILL G. HENDIRCKS, d/b/a DESERET
ROOFING COMPANY,

Plaintiff,

v.

INTERSTATE HOMES, INC., et al.,

Defendants.

SUPPLEMENTAL JUDGMENT
AND AWARD OF COSTS AND
ATTORNEY'S FEES

Civil No. C-84-2993
(Judge Sawaya)

WHEREAS pursuant to the Order and Summary Judgment entered herein on December 13, 1984, plaintiff was awarded his costs and attorney's fees reasonably incurred herein, the amounts of which to be submitted in a bill for costs and attorney's fees pursuant to Rule 54(d) of the Utah Rules of Civil Procedure, and

WHEREAS on December 20, 1984, plaintiff filed with the Court and served upon defendant a duly sworn and verified memorandum of costs in the amount of \$495.75 and attorney's fees in the amount of \$4,813.80, and

WHEREAS defendant has not within the time prescribed by Rule 54(d) filed with the Court any objection to plaintiff's Memorandum of Costs and Attorney's Fees or motion to have such costs or fees taxed by this Court,

NOW, THEREFORE, for the reasons stated above and good cause appearing therefor,

LAW OFFICES
FABIAN & CLENDENIN
A PROFESSIONAL CORPORATION
TWELFTH FLOOR 215 SOUTH STATE STREET
SALT LAKE CITY UTAH 84111-2309

ITEM "G"

Plaintiff is hereby awarded judgment for costs in the amount of \$495.74 and attorney's fees in the amount of \$4,813.80 and judgment is hereby entered against defendant Interstate Homes for the same.

DATED this ____ day of January, 1985.

BY THE COURT:

DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Supplemental Judgment and Award of Costs and Attorney's Fees, postage prepaid, this 14th day of January, 1985, to the following:

Robert A. Burton, Esq.
Strong and Hanni
Boston Building
Salt Lake City, Utah 84101

Henry S. Nygaard, Esq.
Beaslin, Nygaard, Coke & Vincent
333 North 300 West
Salt Lake City, Utah 84103

Kent Shearer, Esq.
Shearer & Carling
1000 Continental Bank Building
Salt Lake City, Utah 84101

William Nygaard

-2-

ITEM "G"

Kent Shearer
Shearer & Carling
Attorneys for Plaintiff
1000 Continental Bank Bldg.
Salt Lake City, UT 84101
Telephone: 359-7771

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

OWENS-CORNING FIBERGLAS CORPORATION

Plaintiff

vs

COMPLAINT

Civil No. *C34-3471*

BILL G. HENDRICKS d/b/a/ DESERET
ROOFING COMPANY and F.C. STANGL
CONSTRUCTION COMPANY, a corporation

Defendants

Comes now plaintiff and, for its claims against defendants,
states:

GENERAL ALLEGATION

Defendant Hendricks d/b/a Deseret Roofing Company (hereinafter Hendricks) is an individual proprietorship with his principal place of business in Salt Lake County, Utah. Defendant F.C. Stangl Construction Company (hereinafter Stangl) is a Utah corporation with its principal place of business in Salt Lake County, Utah.

FIRST CLAIM

Defendant Hendricks owes plaintiff \$9,912.11, together with interest at 10 percent per annum from June 17, 1983, for goods sold and delivered by plaintiff to said defendant from on or about May 2, 1983 to on or about June 17, 1983.

SECOND CLAIM

1. Defendant Stangl had at the time of the commencement of work upon and furnishing of materials for the improvement thereon, some right, title and interest to certain real property situate in Iron County, State of Utah, which improvement was of a value well in excess of \$2,000.00.

2. Plaintiff, as materialman to defendant Hendricks, the

ITEM "H"

subcontractor to U.S. Homes also known as Interstate Homes, the original contractor of Stangl, from on or about May 2, 1983 to on or about June 17, 1983 sold and furnished certain materials for use and consumption within the construction of such improvement, which said materials were so used and consumed and were of a reasonable value of \$9,912.11.

3. Stangl did not obtain from such original contractor the bond required by 14-2-1, Utah Code Annotated 1973, as amended, or, alternatively, refused to exhibit said bond upon the request of plaintiff.

4. By reason of such failure, plaintiff has been damaged and, pursuant to 14-2-2, Utah Code Annotated 1953, as amended, Stangl is liable to plaintiff in the sum of \$9,912.11, together with interest thereon at 10 percent pper annum from June 17, 1983.

WHEREFORE, plaintiff prays judgment as follows:

A. Against defendants jointly and severally for the sum of \$9,912.11, together with interest thereon at 10 percent per annum from June 17, 1983, and for plaintiff's court costs herein; and

B. For such other and further relief as may be proper.

Kent Shearer
Kent Shearer
Shearer & Carling
Attorneys for Plaintiff
1000 Continental Bank
Salt Lake City, UT 84101

Plaintiff's address:

840 West 2600 South
Salt Lake City, UT 84119

ITEM "H"

were "resident of Stamford (sic) Connecticut", provide the only basis for the statement by the latter court that the taxpayer was in fact a resident of that city and state

[2] But we take judicial notice that the taxpayer was admitted to the bar of our court on April 17, 1934, and to our knowledge he has been actively practicing his profession in Puerto Rico ever since. Indeed he alleges in his brief and the Treasurer in his does not deny that the taxpayer maintains a house, open the year round in Puerto Rico, conducts his business personally in Puerto Rico, but returns from time to time to the state of his "domicile".³

From the foregoing it seems evident that throughout these proceedings there has been consistent failure to distinguish between "residence" on the one hand and "domicile" on the other. We might go even further and conclude from the pleadings read in the light of matters within our own knowledge that the meanings of the words have been interchanged and that in actual fact the taxpayer, although "domiciled" in Stamford, Connecticut, has been a "resident" of Puerto Rico since 1934. At least we might go so far as to conclude that the taxpayer is a resident of Puerto Rico within the meaning of the Income Tax Act of 1924, since he cannot actively practice his profession in Puerto Rico personally and be there as a "mere transient or sojourner", that is, "one who comes to Puerto Rico for a definite purpose which in its nature may be promptly accomplished," but on the contrary that he is one who is there for a purpose "of such a nature that an extended stay may be necessary for its accomplishment, and to that end * * * makes his home temporarily in Puerto Rico, * * * though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned." See Regulations 1 Art 183, quoted in footnote 2 supra

³ Our records indicate that correspondence with the taxpayer with reference to cases in which he has appeared in our court has at his request sometimes been

[3] But the record before us is so inadequate and the statements in such pleadings as are printed therein are so confusing, that it seems to us preferable to follow the procedure adopted in *City of Hammond v. Schappi Bus Line*, 275 U.S. 164, 48 S.Ct. 66, 72 L.Ed. 218, *Mayo v. Lake Land Highlands Canning Co.*, 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774, and *Sparks v. Hart Coal Corporation*, 6 Cir., 74 F.2d 697, and remand this case for a definite finding of the fact essential to the determination of the constitutional question argued before us.

The judgment of the Supreme Court of Puerto Rico is set aside and the case is remanded to that court for further proceedings not inconsistent with this opinion.



PARMELEE v CHICAGO EYE SHIELD CO
No 13387

Circuit Court of Appeals, Eighth Circuit.
Oct 28, 1946

1. Courts ⇨354

The procedure prescribed in federal rule relating to summary judgment is designed for prompt disposition of action where there is no genuine issue regarding any material facts, thus avoiding a useless trial to prove undisputed facts. Federal Rules of Civil Procedure, rule 56, 28 U.S.C.A. following section 723c

2. Courts ⇨354

The federal rule relating to summary judgment contemplates an inquiry in advance of trial as to whether there is a genuine issue and may be invoked for purpose of striking sham claims and defenses which obstruct a prompt determination of

addressed to him in San Juan, Puerto Rico sometimes in Stamford, Connecticut, and sometimes at addresses in New York, N. Y.

the truth, and the rule cannot be so applied as to deprive a litigant of his right to try any genuine issue by jury or otherwise. Federal Rules of Civil Procedure, rule 56, 28 U.S.C.A. following section 723c

3. Courts ⇨354

If pleadings raise a genuine issue of fact material to dispute between the parties, summary judgment should not be granted. Federal Rules of Civil Procedure, rule 56, 28 U.S.C.A. following section 723c

4. Courts ⇨354

On motion for summary judgment if judgment is not rendered on the whole case and issues remain which must be tried, court should determine what material facts are in issue and what are not, and should specify facts which appear without substantial controversy and proceed with trial as to facts which remain in dispute, and, at close of trial, court should make findings of fact and conclusions of law on the whole case if case is tried without jury, and, if case is a jury case disputed issues should be submitted to jury under proper instructions. Federal Rules of Civil Procedure, rule 56, 28 U.S.C.A. following section 723c

5. Courts ⇨354

On motion for summary judgment, burden of proof is on moving party to establish that there is no genuine issue of fact, and all reasonable doubts are resolved against him. Federal Rules of Civil Procedure, rule 56, 28 U.S.C.A. following section 723c

6. Courts ⇨347(3)

The determination of defendant's demand by counterclaim in plaintiff's action rather than by independent action is favored as serving to avoid circuity of action, inconvenience, expense, consumption of court's time, and injustice. Federal Rules of Civil Procedure, rule 13(a, b), 28 U.S.C.A. following section 723c

7. Courts ⇨332

One of purposes of adoption of Federal Rules was to enable parties to determine their differences in one action. Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c

8. Courts ⇨354

Where plaintiff's claim was for goods sold pursuant to distributorship agreement between the parties, and defendant's counterclaims were based upon purchases by defendant pursuant to and during same distributorship agreement, plaintiff was not entitled to summary judgment under Federal Rule 54(b) regardless of whether counterclaims arose out of transaction or occurrence which was the subject matter of plaintiff's claim. Federal Rules of Civil Procedure, rules 13(a, b), 54(b), 28 U.S.C.A. following section 723c

9. Courts ⇨354

The summary judgment procedure is a drastic remedy and federal rule relating to summary judgment must be strictly complied with. Federal Rules of Civil Procedure rule 56 28 U.S.C.A. following section 723c

10. Courts ⇨354

Where plaintiff sued for goods sold pursuant to distributorship agreement between the parties and defendant denied that it was indebted to plaintiff in any amount and alleged that, by reason of counterclaims which were based upon purchases by defendant pursuant to and during such distributorship agreement, defendant was entitled to recover from plaintiff an amount in excess of plaintiff's demand plaintiff was not entitled to summary judgment. Federal Rules of Civil Procedure, rules 13(a, b), 56 28 U.S.C.A. following section 723c

Appeal from the District Court of the United States for the Western District of Missouri, Albert A. Ridge, Judge.

Action by the Chicago Eye Shield Company against Alfred F. Parmelee, doing business as United States Safety Service Company, on an account for goods sold to defendant, wherein defendant filed counterclaims. From a judgment entered on plaintiff's motion for summary judgment, defendant appeals.

Reversed and remanded with directions. Alpha N. Brown, of Kansas City, Mo., for appellant.

ITEM "I"

ITEM "I"

Albert Thomson, of Kansas City, Mo. (Paul R. Stinson, of Kansas City, Mo., Winston. Strawn & Shaw, of Chicago, Ill., and Stinson, Mag, Thomson, McEvers & Fizzell, of Kansas City, Mo., on the brief), for appellee.

Before GARDNER, WOODROUGH, and RIDDICK, Circuit Judges.

GARDNER, Circuit Judge.

This is an appeal from a judgment entered on motion of the plaintiff for summary judgment. The parties will be referred to as they were designated in the trial court. The plaintiff sued the defendant on an account for goods sold and delivered between February 1, 1945, and October 1, 1945. The balance alleged to be due was \$5,639.10. Defendant answered, admitting that plaintiff had sold and delivered to it goods of the value of \$6625.50, and that the items attached to plaintiff's complaint were correct except for an admitted credit of \$13.61. It further alleged that:

"Defendant denies that defendant is indebted to the plaintiff in any amount whatsoever and alleges and avers that by reason of the claims hereinafter set forth and alleged the defendant is entitled to have and recover of the plaintiff an amount far in excess of the plaintiff's demand; and that by reason of the matters and things hereinafter set forth defendant is not indebted to plaintiff and that by reason of the following matters, defendant's cross-claims and counter-claims should be set off against any amount claimed to be due plaintiff and the plaintiff is not entitled to recover judgment against defendant for any amount."

Defendant pleaded six counter-claims, the nature of which we shall hereinafter consider.

Plaintiff moved for summary judgment in the amount of \$5,109.90, and in its motion recited that:

"This motion is filed under Rule 56 of the Rules of Civil Procedure [28 U.S.C.A. following section 723c] * * * and is based upon the wording of Rule 56, as interpreted in the case of Seagram-Distillers Corporation v. Manos, D.C., 25 F.Supp. 233 * * *."

It also recited that its complaint was filed on October 22, 1945, and that defendant on November 8, 1945, obtained an order enlarging the time for serving answer for a period of thirty days, and that on December 12, 1945, it obtained a further order enlarging the time until December 17, 1945, at which time it served its answer admitting that plaintiff had sold and delivered to defendant goods of the value of \$6625.50, for which payment had not been made. It was recited in this motion that defendant in its answer set up as a counter-claim that plaintiff owed defendant the sum of \$1515.60 for goods and merchandise sold and delivered by defendant to plaintiff and that plaintiff admits that it purchased said goods and merchandise in the amount of \$1515.60. This motion was filed January 2, 1946, and on January 7, 1946, it filed its reply denying liability on any of the counter-claims except the first one. By stipulation and admission on oral argument it was agreed that all items of plaintiff's account represented "purchases made by defendant from plaintiff pursuant to the distributorship agreement and arrangement set forth and described in the second, third, fourth, fifth and sixth counter-claims of defendant on file herein."

On March 25, 1946, the trial court granted plaintiff's motion and entered a judgment in its favor for \$5,109.90, being the amount of its claim less the amount claimed by defendant in its first counter-claim. The court ordered that the remaining counter-claims, second to sixth, inclusive, be tried together in a separate trial. The court later entered an order providing that defendant might file a bond in the sum of \$6,000, conditioned for the satisfaction of the judgment pending final determination of the remaining counter-claims, in which event the enforcement of the judgment should be stayed. From the judgment as entered defendant prosecutes this appeal, urging error in the entry of the summary judgment.

[1-3] While plaintiff's motion for summary judgment was based entirely upon Rule 56, the judgment entered is defended as warranted by Rule 54(b), as well as by Rule 56. The summary judgment pro-

cedure prescribed in Rule 56 is designed for the prompt disposition of the action where there is no genuine issue regarding any material facts, thus avoiding a useless trial to prove facts which are not really disputed. *Altman v. Curtiss-Wright Corp.*, 2 Cir., 124 F.2d 177; *Miller v. Miller*, 74 App.D.C. 216, 122 F.2d 209. The rule contemplates an inquiry in advance of trial as to whether there is a genuine issue and may be invoked for the purpose of striking sham claims and defenses which obstruct a prompt determination of the truth. It can not be so applied as to deprive a litigant of his right to try any genuine issue by jury or otherwise. *Whitaker v. Coleman*, 5 Cir., 115 F.2d 305. If the pleadings raise a genuine issue of fact, material to the dispute between the parties, a summary judgment should not be entered. *Nickelson v. Nestles Milk Products Corp.*, 5 Cir., 107 F.2d 17.

[4,5] The proceeding on motion for summary judgment is not to be regarded as a trial, but for the determination of whether or not there is a genuine issue to be tried. On such a motion, if judgment is not rendered on the whole case and issues remain which must be tried, the court should determine what material facts are in issue and what are not, and should specify the facts which appear without substantial controversy and proceed with the trial as to the facts which remain in dispute. At the close of the trial on the disputed facts it should make findings of fact and conclusions of law on the whole case, if the case is a court case as distinguished from a jury case. If the case be a jury case the disputed issues should, of course, be submitted to the jury under proper instructions. On such a motion the burden of proof is on the moving party to establish that there is no genuine issue of fact and all reasonable doubts are resolved against him. *Wallington v. Fairmont Creamery Co.*, 8 Cir., 139 F.2d 318.

Plaintiff argues that it was entitled to judgment under Rule 54(b) because defendant in its answer admitted that "the plaintiff has heretofore sold and delivered to the defendant goods of the value of \$6625.50."

157 F.2d—37½

Defendant did not specifically allege payment but it did allege that it was not indebted to plaintiff in any amount whatever, and alleged that "the defendant is entitled to have and recover of the plaintiff an amount far in excess of the plaintiff's demand." This was based upon six counterclaims pleaded in the answer. As has been observed, the first counterclaim was recognized as pleading a good cause of action and the amount claimed was credited upon and deducted from the amount claimed by plaintiff, judgment being entered for the balance. The second, third, fourth, fifth and sixth counterclaims were recognized by the court as raising substantial issues as it set them down for trial in the future. The second counterclaim was for \$328.21 for commissions on sales made by plaintiff in 1944 in the Texas and Louisiana territory of defendant. It appears from the stipulation that defendant's counter-claims arose out of dealings between the parties under a distributorship agreement. Plaintiff's cause of action while for goods sold and delivered was for goods sold and delivered pursuant to this distributorship agreement. The third counter-claim was for \$10,000 for the alleged breach of the distributorship agreement. The fourth claim was for \$701.00 which defendant sought to recover as an overcharge balance for certain merchandise sold to it. This again was under the distributorship agreement. The fifth counter-claim was for \$25,000 for a breach of the distributorship agreement whereby plaintiff had agreed to permit defendant to sell certain specified products of plaintiff. Defendant's sixth counter-claim was for \$75,000 for an alleged violation by plaintiff of the anti-trust laws. Whether or not this was violative of the distributorship agreement we need not determine.

Rule 54(b) provides as follows:

"When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with re-

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spect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

Resting on this rule plaintiff contends that the only question is whether the counter-claims alleged by defendant arise "out of the transaction or occurrence which is the subject matter of the claim." Confessedly, if any of the counter-claims second, third, fourth, fifth and sixth, arise out of the transaction or occurrence which is the subject matter of plaintiff's claim judgment should not have been entered under this rule. The stipulation of the parties shows that the plaintiff's claim was for goods sold pursuant to a distributorship agreement between the parties and that the claims set forth in some of defendant's counter-claims were based upon purchases by defendant pursuant to and during the same distributorship agreement. Rule 13, pertaining to counter-claims, provides that:

"(a) A pleading shall state as a counter-claim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

"(b) A pleading may state as a counter-claim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

[6,7] The determination of a defendant's demand by counter-claim in plaintiff's action rather than by independent action is favored as serving to avoid circuity of action, inconvenience, expense, consumption of the court's time, and injustice, and the trend of judicial decision is toward a liberal extension of the right to counter-claim. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U.S. 596,

14 S.Ct. 710, 38 L.Ed. 565. One of the important purposes of the adoption of the code system of pleadings and of the Federal Rules of Procedure was to enable the parties to determine their differences in one action. The counter-claims here represented "the right of the defendant to have the claims of the parties counterbalanced in whole or in part, judgment to be rendered for the excess, if any." Olsen v. McMaken & Pentzien, 139 Neb. 506, 297 N.W. 830, 833. The counter-claims pleaded do not present sham issues, but issues that must be tried, and if they arose out of the transaction or occurrence which is the subject matter of the plaintiff's claim they are a bar to granting plaintiff's motion under Rule 54. Counter-claims have long been permitted under the various state statutes governing pleadings.

In the case of Story & Isham Commercial Co. v. Story, 100 Cal. 30, 34 P. 671, 674, the question involved the construction of a code provision permitting the pleading of counter-claims. The court, in holding that the transaction, within the meaning of the code section, was not limited to the facts set forth in plaintiff's complaint, but included the entire series of acts and mutual conduct of the parties in the business or proceeding between them, among other things said:

"The plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist upon a judgment on this fact alone, if the fact is so connected with others that it forms only a portion of the transaction. The transaction which was the foundation of the cause of action set forth in the complaint herein is not limited to the facts therein set forth, but includes the entire series of acts and mutual conduct of the parties in the business or proceeding between them which formed the basis of their written agreement."

See, also: North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., supra; Prescott Nat. Bank v. Head, 11 Ariz. 213, 90 P. 328, 21 Ann.Cas. 990; Scott v. Waggoner, 48 Mont. 536, 139 P. 454, L.R.A. 1916C 491; McHard v. Williams, 8 S.D. 381, 66 N.W. 930, 59 Am.St.Rep. 766; Ad-

vance Thresher Co. v. Klein, 28 S.D. 177, 133 N.W. 51, L.R.A.1916C 514; Northwestern Port Huron Co. v. Iverson, 22 S.D. 314, 117 N.W. 372, 133 Am.St.Rep. 920; Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750, 45 A.L.R. 1370; Williams v. Robinson, D.C., 1 F.R.D. 211.

In passing it should be observed that this rule refers to plaintiff's cause of action as a "claim." The rule would seem to be limited to cases in which the plaintiff is making more than one claim for relief. Here it is not doing so. In Reeves v. Beardall, 316 U.S. 283, 62 S.Ct. 1085, 1087, 86 L.Ed. 1478, there were three counts or causes of action pleaded in the complaint. Count 1 was based upon a promissory note. Count 2 was based upon a contract between plaintiff and defendant and defendant's decedent, by which the latter agreed not to change her will in consideration for the return to her of certain securities. Count 3 of the complaint contained a claim against a third person who was alleged to hold certain assets of decedent to which plaintiff was entitled by reason of the contract alleged in count 2. A final judgment was entered on count 2 and it was held that this was a final judgment. The court said:

"The claim against respondent on the promissory note was unrelated to the claim on the contract not to change the will. Those two claims arose out of wholly separate and distinct transactions or engagements. * * * After the entry of the judgment on Count II, the claim based on the contract not to change the will was terminated and could not be affected by any action which the Court might take as respects the remaining claims."

[8] In the instant case, as has been observed, there could not be separate actions on different claims, counts or causes of action in plaintiff's complaint because there was but one claim presented. We are of the view that plaintiff was not entitled to judgment under Rule 54(b) regardless of whether the counter-claims arose out of the transaction or occurrence which is the subject matter of plaintiff's claim.

It is insisted by plaintiff that Rule 56 did not require, as a condition precedent to the

entry of summary judgment, that all counter-claims arising out of the transaction or occurrence which is the subject matter of the plaintiff's claim must be determined before the entry of such judgment on plaintiff's claim. Rule 56 provides in part as follows:

"(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

[9,10] We have already adverted to the general purpose or design of this procedure and to the fact that the counter-claims pleaded raise substantial issues. The procedure is generally considered as a drastic remedy and strict compliance with the provisions of the rule is required. A number of the District Courts have held that the existence of a counter-claim which presents a real issue prevents the granting of motion for summary judgment. Standard Rolling Mills, Inc. v. National Mineral Co., D.C.N.Y., 2 F.R.D. 236; Boerner v. United States, D.C.N.Y., 26 F.Supp. 769. In the instant case, defendant denied that it was indebted to the plaintiff in any amount whatever, and alleged that by reason of the counter-claims defendant was entitled to recover of the plaintiff an amount far in excess of plaintiff's demand. This tendered an issue of fact. Before the adoption of the Federal Rules of Procedure a number of the states had provision for summary judgment, notably New York, Michigan, Illinois and Connecticut. In New York it has been held that where a counter-claim is properly presented a summary judgment on plaintiff's claim may not be granted since the right to counter-claim is a substantial right which is to be protected. Aetna Life Ins. Co. v. National Dry Dock & Repair Co., 230 App.Div. 486, 245

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ka, 148 Misc 60, 264 N Y S 204

The case of Scagram Distillers Corp v Manos, D C S C, 25 F Supp 233, is relied upon by plaintiff as sustaining a contrary view. In that case a summary judgment was entered on plaintiff's claim before trial on defendant's counter claim. Defendant admitted the plaintiff's claim and from the circumstances the court found that defendant was more concerned to avoid a judgment against himself than to obtain one against the plaintiff. In other words, the trial court was convinced that defendant's counter claim was not interposed in good faith. There is no basis for such a contention in the instant case. It is true that defendant obtained two extensions of time within which to plead, amounting in the aggregate to thirty five days. These extensions were granted for cause shown. They were not unreasonable, especially in view of the fact that defendant's answer embodied six counter claims, and there is nothing to indicate that plaintiff was prejudiced thereby.

The judgment appealed from is therefore reversed and the cause remanded to the lower court with directions to vacate the judgment and for further proceedings consistent herewith.



GILES v UNITED STATES.

No 11187.

Circuit Court of Appeals, Ninth Circuit.
Oct 14, 1946

Rehearing Denied Nov 13, 1946.

1. Escape \Rightarrow 3

A prisoner performing, under general supervision, the chores assigned to him on the dock on island on which penitentiary was located, was in "custody" within statute prohibiting attempt to escape from custody, notwithstanding that guard did not follow prisoner around and keep prisoner

CA § 753h

See Words and Phrases, Permanent Edition, for all other definitions of "Custody"

2. Criminal law \Rightarrow 1168(4)

In prosecution for attempt to escape from custody of penitentiary warden, refusal to strike reply that other men had prisoner under supervision, as not responsive to question whether witness had prisoner under supervision, was not prejudicial, if error 18 U S C A § 753h.

3. Escape \Rightarrow 51/2

An "attempt" to escape from custody of penal institution includes a successful as well as an unsuccessful attempt. 18 U S C A § 753h

See Words and Phrases, Permanent Edition, for all other definitions of "Attempt".

4. Escape \Rightarrow 11

In prosecution for attempt to escape from custody of penitentiary warden, instruction that an "attempt" is an act tending toward the accomplishment and done in part execution of the design to commit a crime, exceeding an intent but falling short of an execution of it, was proper 18 U S C A § 753h

5. Criminal law \Rightarrow 1931/2

A prosecution for a minor offense included in a greater will bar a prosecution for the greater, if on an indictment for the greater the accused can be convicted of the lesser

6. Criminal law \Rightarrow 1931/2

A conviction for lesser offense of attempt to escape from custody of penitentiary warden bars a prosecution for greater offense of escaping from custody of warden, if on an indictment for the greater offense the accused can be convicted of the lesser offense.

DENMAN, Circuit Judge, dissenting

Appeal from the District Court of the United States for the Northern District of California, Southern Division, Michael J. Roche, Judge

John Knight Giles was convicted for attempt to escape from the custody of the warden of the United States Penitentiary at Alcatraz Island, and he appeals

Affirmed

John Knight Giles, in pro per
Frank J. Hennessy, U S Atty, and
James T. Davis, Asst U S Atty, both of
San Francisco, Cal., for appellee

Before DENMAN, HEALY, and
BONE, Circuit Judges

HEALY, Circuit Judge

Appellant was convicted of a violation of 18 U S C A § 753h¹. The indictment charged that the accused, being a person committed to the custody of the Attorney General of the United States and his authorized representative, namely, the warden of the United States Penitentiary at Alcatraz Island, did on or about July 31, 1945, attempt to escape from custody.

The evidence is that on the date named appellant was an inmate of Alcatraz, having been duly committed to the custody of the warden as the representative of the Attorney General. On the morning of that date, clothed in prison uniform, he was working with other inmates of the penitentiary on a dock at Alcatraz under the general supervision of prison guards. The dock is outside the walls at a distance of some three eighths of a mile from the prison proper. An army vessel arrived at the dock at 10 15 A M and departed a few minutes later, during which time appellant, clad now in the uniform of an army sergeant, contrived to get aboard her from beneath the wharf. One of the crew saw the man as he came aboard. Immediately prior to the docking of this vessel the prison guards counted the prisoners on the dock, and appellant was present. Immediately after the vessel pulled away from the dock the prisoners were again counted and appellant was found missing. A search

¹ "Any person committed to the custody of the Attorney General or his authorized representative, or who is confined in any penal or correctional institution pursuant to the direction of the Attorney General, or who is in custody by virtue of any process issued under the laws of the United

States by any court, judge, or commissioner, or who is in custody of an officer of the United States pursuant to lawful arrest, who escapes or attempts to escape from such custody or institution, shall be guilty of an offense * * * 18 U S C A § 753h

[1] Appellant argues that he was not in custody while going about the chores assigned him on the dock, hence he could not be deemed to have attempted to escape from custody. The reason advanced is that he was not at all times under the observation of one or the other of the prison guards. The argument is without force. The statutory term "custody," as applied, certainly, to the situation of appellant, is not so narrow and restricted. Appellant likens the case to one where the custodian of a prisoner purposely abandons his charge, leaving him free to go his own way. There was no abandonment of custody in this instance. Moreover, the question of custody was submitted to the jury as one of fact in an instruction stating that, in order to convict, the evidence must show beyond a reasonable doubt that the accused was actually in custody at the beginning of the alleged attempt to escape.

[2] In connection with this phase of his defense appellant complains of the denial by the court of his motion to strike part of the answer of a government witness, a prison guard. On cross examination appellant asked this witness: "Now, Mr. Crowell, in my work on the dock, did you follow me around and keep me under supervision all the time?", to which inquiry the witness replied, "not myself personally, no, but there were other men that had you under supervision." While the latter portion of the reply was not strictly responsive, the ruling on the motion to strike, if error at all, was not prejudicial. As already observed, it was not in the circumstances of this case essential to custody

States by any court, judge, or commissioner, or who is in custody of an officer of the United States pursuant to lawful arrest, who escapes or attempts to escape from such custody or institution, shall be guilty of an offense * * * 18 U S C A § 753h

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RULE 13 *

COUNTERCLAIM AND CROSS-CLAIM

(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

RULE 56 *

SUMMARY JUDGMENT

(c) **Motion and Proceedings Thereon.** The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* Photocopied from Utah Code Annotated, 1953, Volume 9B.

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I HEREBY CERTIFY That on the 26th day of March, 1985, I caused four (4) copies each of the foregoing BRIEF OF APPEALLENTS to be deposited in the United States mail, postage prepaid, and addressed to:

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