1987

Pacific Coast Title Insurance Company v. Hartford Accident and Indemnity Company : Reply Brief

Utah Supreme Court

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BRIEF

DOCKET NO. 8719, 8720, ~~8737~~ 8736

IN THE SUPREME COURT of the STATE OF UTAH

PACIFIC COAST TITLE INSURANCE COMPANY, a corporation
Plaintiff and Respondent,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation,
Defendant and Appellant.

Case No. 8719

PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION, a corporation
Plaintiff and Respondent,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation,
Defendant and Appellant.

Case No. 8720

FELT SYNDICATE, INC.,
Plaintiff and Appellant,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation,
Defendant and Respondent.

Case No. 8736

REPLY BRIEF OF HARTFORD ACCIDENT & INDEMNITY COMPANY ON APPEAL

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REPLY BRIEF OF HARTFORD ACCIDENT & INDEMNITY COMPANY ON APPEAL

PRELIMINARY STATEMENT

Hartford deems it advisable to submit a brief reply to the briefs filed on behalf of the respective plaintiffs in the above consolidated cases. We shall treat first, the

points made by Felt on its appeal, and subsequently the points raised by the various plaintiffs in response to the contentions of the Hartford. In this brief, we shall designate the parties in the same manner as followed in our original brief, and we shall also refer to the record by the same system of designations.

POINTS TO BE ARGUED

POINT I.

FELT WAS NOT THE REAL PARTY IN INTEREST AS TO THE PORTION OF THE CONSTRUCTION CONTRACT, WHICH IT ASSIGNED TO WRIGHT-WIRTHLIN.

POINT II.

THE DEFENSE OF ASSIGNMENT WAS PROPERLY RAISED BY THE HARTFORD IN ITS ANSWER TO FELT'S COMPLAINT.

POINT III.

THE HARTFORD DOES NOT STAND IN CASSADY'S SHOES. IT IS NOT BOUND BY HIS KNOWLEDGE, NOR CAN HIS ACTS OR AGREEMENTS WAIVE RIGHTS OF THE HARTFORD, OR ESTOP IT FROM ASSERTING RIGHTS FOR WHICH IT CONTRACTED. IT IS ENTITLED TO STAND ON THE COVENANTS OF ITS BOND.

POINT IV.

THE SUPPLEMENTAL AGREEMENT DID NOT HAVE THE EFFECT OF WAIVING PRIOR BREACHES ON THE PART OF ANY OF THE PARTIES. THE HARTFORD DID NOT BY SIGNING THE SUPPLEMENTAL AGREEMENT WAIVE ANY BREACHES UPON THE PART OF FELT OR PRUDENTIAL FEDERAL.

POINT V.

FELT IS BARRED FROM MAINTAINING ITS ACTION AND FROM MAINTAINING THIS APPEAL BY THE PROVISIONS OF SECTION 16-9-3, U. C. A., 1953.

POINT VI.

HARTFORD DID NOT ADMIT IN ITS ORIGINAL BRIEF THAT PRUDENTIAL FEDERAL WAS ENTITLED TO RECOVER ANY DAMAGES WHATSOEVER.

POINT VII.

HARTFORD DID NOT CLAIM THAT THE OBLIGATIONS OF THE OBLIGEES WERE JOINT AND SEVERAL.

POINT I.

FELT WAS NOT THE REAL PARTY IN INTEREST AS TO THE PORTION OF THE CONSTRUCTION CONTRACT, WHICH IT ASSIGNED TO WRIGHT-WIRTHLIN.

Felt claims, on its appeal, that notwithstanding that it had assigned to Wright-Wirthlin 89.6% interest in its right to receive funds from the miscellaneous account under the primary construction contract, (Ex. Pr.-2), that it was nonetheless the real party in interest and entitled to bring this action. The argument is falsely premised. The purpose of the real party in interest statutes was not to protect the interest of the equitable owner of the *chose en action,* but to protect the obligor. This court recently said in *Shaw v. Jeppson,* (Ut.), 239 Pac. (2d) 745:

> "The reason the defendant has the right to have a cause of action prosecuted by the real party in interest is so that the judgment will preclude any action on the same demand by another and permit the defendant to assert all defenses or counterclaims available against the real owner of the cause."

Felt refers to ancient common law principles, and then argues, by analogy to the principles of contracts for the benefit of third party beneficiaries, that it is

entitled to bring this action, and that it is the real party in interest. The analogies upon which it attempts to proceed are false, and whatever may have been the rules in the ancient common law, the rule has been well established in this jurisdiction, from the beginning of statehood, that the assignee of a *chose en action* is the real party in interest, and the one entitled to bring the suit.

In *Wines vs. Rio Grande W. Ry. Co.,* (Ut.), 33 Pac. 1042, this court said:

> "So it is held that *an assignee is the real party in interest,* and *it is immaterial whether or not any consideration was actually paid for the assignment,* or whether or not the assignment was merely made for the purpose of the suit, if it was in fact made." (Emphasis ours.)

In *Wilson v. Kiesel, et al.,* (Ut.), 35 Pac. 488, this court said at page 491:

> "The statute of Utah (2 Comp. Laws 1888, ♯ 3169), declares that every action must be prosecuted in the name of the real party in interest, except certain cases, which do not in any wise affect the question at bar. This language does not admit of doubt as to its meaning. The real party in interest *at the beginning of the action must prosecute it in his own name.* It is not necessary to enlarge upon the reasons for this rule, or to cite decisions under it; it is sufficient for us to know what the law is, and it is our duty to enforce it.
>
> "* * * As the nominal plaintiff, Wilson, had no judgment or other cause of action against these defendants *when he brought them into court,* it is quite apparent that he cannot, in justice complain if his action is dismissed at his cost, and the as-

signee cannot complain, because he has never sought any judgment against defendants." (Emphasis ours.)

In *Anderson vs. Yosemite Mining & Milling Co.*, (Ut.), 35 Pac. 502, this court said at page 503:

> "Upon an examination of the record, we find that the contention of the appellant cannot be sustained. * * * The fact that plaintiff still retained the note in his possession would not deprive the assignee of the right to sue thereon in accordance with the contract between the parties. Having authority to sue, Scott and Remington could sue one or all of the makers. *The assignment carried with it the note and debt evidenced thereby.* Scott and Remington [the assignees] were the real parties in interest and entitled to sue." (Emphasis ours.)

In *National Union Fire Ins. Co.* v. *Denver & R. G. R. Co.*, (Ut.), 137 Pac. 643, this court said:

> "Comp. Laws 1907, ‡2902, provides: 'Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. * * *'
>
> "* * * Mr. Pomeroy, in his excellent work on Code Remedies (4th Ed.), ‡127, in referring to the rule that all actions should be prosecuted in the name of the real party in interest, says: 'Not only does the rule prevail when the assignment is absolute and complete and the assignee is the legal owner of the demand; it prevails with equal force in cases where the assignment is simply equitable in its character; and the as-

> signee's title would not have been recognized in any form by a court of law under the old system, but would have been purely equitable. Such *assignee, being the real party in interest, must bring the action in his own name.'* " (Emphasis ours.)

In *Bank of American Fork* v. *Smith,* (Ut.), 140 Pac. 122, this court said at page 125:

> "We think that, when the agreement and the transactions had under it are considered as a whole, what Mr. Jensen did in obtaining money from the plaintiff at least amounted to an equitable assignment of the obligations assumed by, as well as the rights arising under the agreement to the plaintiff. * * * We have recently held that under our constitution and statutes the equitable *assignee of a chose in action is the real party in interest,* and may sue as such assignee, notwithstanding that such could not have been done at common law." (Emphasis ours.)

In *Moss* v. *Taylor,* (Ut.), 273 Pac. 515, this court said at page 520:

> "The *assignee of a cause of action is a real party in interest* and may prosecute an assigned cause of action in his own name under the provisions of Comp. Laws Utah 1917, ‡6495, although the assignment was made without consideration or was made solely for the purpose of bringing an action." (Emphasis ours.)

The rule laid down by this line of decisions has never been disturbed, and seems now to be so well established that there has been no occasion for this court to pass upon it in recent years. It follows therefore, that Felt was not the real party in interest, at least as to

89.6% of the claim, and the court properly refused to allow it any recovery on that portion.

Felt attempts to derive comfort from the fact that Wright-Wirthlin reassigned its rights to Felt by an instrument dated December 20, 1956 (Ex. F-35). This was the date on which trial of these actions commenced. Felt did not have this right at the time it commenced suit, or at any time prior to trial. It could not, by a transaction occurring after the commencement of suit assert or enforce a right which it did not have at the time suit was commenced. *Wilson v. Kiesel,* (Ut.), 35 Pac. 488. Moreover, this right had completely lapsed by virtue of the limitation period provided in the bond as follows:

> "5. No suit, action, or proceeding by reason of any default, whatever, shall be brought on this Bond after two (2) years from the date on which the final payment under the contract falls due, provided, however, that in the event there exists or is pending any collateral litigation which has the effect of making it impossible for any Obligee under this Bond to determine its rights hereunder, a suit, action, or other proceeding under this Bond may be instituted within six (6) months after entry of final judgment in said collateral litigation." (Ex. Pr.-1)

The collateral litigation necessary to determine the rights of the obligees on the bond terminated October 5, 1955. (Tit. Co. R. 13). Under the terms of the bond above set forth, any action against the Surety on the bond was required to be commenced no later than April 4, 1956. Wright-Wirthlin brought no action within that

time. It could not breath new life into its stale claim by assigning it back to Felt.

It should be noted here, that the Hartford interposed the assignment as a complete defense, since it was a clear violation on the part of Felt of the primary construction contract (Ex. Pr-2, ¶-15). The court did not treat it as a complete defense, but rather as a partial defense. The error, if any, was in Felt's favor, and it has no grounds upon which to complain.

POINT II.

THE DEFENSE OF ASSIGNMENT WAS PROPERLY RAISED BY THE HARTFORD IN ITS ANSWER TO FELT'S COMPLAINT.

Felt apparently in desperation, seeks to take refuge in technical rules of pleading, and asserts that the Hartford's defense of assignment was not properly or timely raised. We invite the court's attention to paragraph 4 of the fourth defense in our answer to Felt's complaint (Felt R. 27), wherein the Hartford specifically alleged that Felt had breached its contract with Cassady by assigning its rights thereunder, directly contrary to the provisions of the primary construction contract (Ex. Pr-2, par. 15). We do not know what better notice we could have given to Felt that we were relying upon the assignment as a defense. It was clearly and specifically pleaded.

Felt now complains that this was a plea in abatement, which had to be specially pleaded. That may have been true under the rules of common law pleading, but it was not generally true under the Codes, and it

most certainly is not true under the form of pleading provided by the Utah Rules. In 41 Am. Jur. at page 397, the rule in this regard under Code Practice, is stated as follows:

> "Some defenses may now be raised by a general denial that under the common-law system of pleading required a plea in abatement. An objection that the plaintiff is not the real party in interest, or that his title to the cause of action is defective, if not apparent on the face of the record, is properly made at common law by a plea in abatement, whereas under the codes *a general denial will serve the purpose.*" (Emphasis ours.)

The Utah Rules provide a form of notice pleading. All that is necessary is to give the adverse party notice of the claim to be made. We submit that notice was given in clear and unequivocal language, by express pleading. If there remains any doubt in the matter, we invite attention to the provisions of Rule 1, U. R. C. P., which provides, in part, as follows:

> "(a) * * * They [the rules] shall be liberally construed to secure the just, speedy, and inexpensive determination of every action."

In commenting on a similar provision in the Federal Rules, it is said in 2 Moore's Federal Practice, pages 56-7:

> "In cases construing the Rules courts have frequently reiterated the maxim of liberal construction. The objective of the Rules has been variously phrased: (1) *'Decisions are to be on the merits and not on procedural niceties.'*; (2) *'to secure a disposition of litigation on the merits*

> *rather than by collateral methods;'* (3) 'to reduce the amount of litigation, to narrow the issues to avoid surprises and to promote justice'; (4) 'to achieve uniformity'; (5) *'to avoid a strict technical interpretation which might work a hardship on the litigants';* Howsoever worded, liberality is the canon of construction." (Emphasis ours.)

The fact that the court did not give to this defense the full effect which we claimed for it, is certainly nothing about which Felt can legitimately complain. It was fully apprised that Hartford relied upon the assignment as a ground of defense, and while the Hartford contended, and still contends, that said assignment is a complete defense to Felt's action, Felt cannot complain that the court found it was only a partial defense.

POINT III.

THE HARTFORD DOES NOT STAND IN CASSADY'S SHOES. IT IS NOT BOUND BY HIS KNOWLEDGE, NOR CAN HIS ACTS OR AGREEMENTS WAIVE RIGHTS OF THE HARTFORD, OR ESTOP IT FROM ASSERTING RIGHTS FOR WHICH IT CONTRACTED. IT IS ENTITLED TO STAND ON THE COVENANTS OF ITS BOND.

All of the plaintiffs have argued in their briefs, either inferentially, or directly, that Hartford stands in the shoes of Cassady, and that because Cassady did or neglected to do, certain things, Hartford is estopped from raising, or has waived, defenses which it might otherwise have. This argument is a fallacy. The surety limited its undertaking to certain terms and conditions among which were that *Cassady would be paid in accordance with the terms and provisions of the primary construction contract,* and that all of the obligees per-

form their respective obligations under their respective contractual agreements.

It is argued that Cassady was aware that Felt's only source of money was from Prudential Federal, and that Prudential Federal would not make funds available until proper contracts were signed and mortgages recorded. From this, it is argued that Cassady should not have started to build on any particular lot until it was sold and a mortgage recorded, and this, despite the fact that Cassady was obligated by the express terms of his contract to go forward within ten days and complete within six months. Felt of course, knew that Cassady relied upon the course of construction payments agreed by Felt to be paid in accordance with the terms of the primary construction contract. Regardless of the effect which Cassady's knowledge had upon his own rights, (and we do not believe it had any), it could in no way impair the rights of the Hartford. The Hartford's bond specifically refers to the construction contract, and must be construed in light of it. Hartford was entitled to rely on its terms and provisions. There is nothing in the record to show that Hartford had any knowledge concerning Felt's limited financial circumstances, or its inability to perform. Neither is there anything in the record to show that Hartford at any time waived the rights for which it contracted in its bond. Regardless of any knowledge which Cassady may have had, or anything which Cassady may have done, such action on his part could not and did not affect the rights of the Hartford since there is no showing in the record that the

Hartford had such knowledge, or that it acquiesced in, or consented to such acts.

POINT IV.

THE SUPPLEMENTAL AGREEMENT DID NOT HAVE THE EFFECT OF WAIVING PRIOR BREACHES ON THE PART OF ANY OF THE PARTIES. THE HARTFORD DID NOT BY SIGNING THE SUPPLEMENTAL AGREEMENT WAIVE ANY BREACHES UPON THE PART OF FELT OR PRUDENTIAL FEDERAL.

All of the plaintiffs contend or assume, that the supplemental agreement (Ex. Pr-3), more or less wiped the slate clean, and that from that point forward the parties started afresh. In other words, all past sins were forgiven. This is not true. There is an admission in said agreement that up to the time of its execution, Prudential Federal had made payments in accordance with, and performed its obligations under the loan agreement. However, the Hartford was not a party to that portion of the agreement, did not either expressly or inferentially agree to it, and expressly limited its concurrence in the agreement to certain modifications in the primary construction contract. The language of Hartford's concurrence is as follows:

> "HARTFORD ACCIDENT AND INDEMNITY COMPANY, as surety on the bond of CASSADY COMPANY, INC., does hereby consent to amended paragraphs 22 and 23, and 7 of the Construction contract in connection with which its bond has been given." (Pr-6).

Paragraph 22 of the primary construction agree-

ment, as modified by the supplemental agreement, was changed only in the following particulars:

(1) The number of houses to be built under each of the three different floor plans was changed slightly.

(2) Cassady would be compensated for extras only if they were agreed to in writing. (Under the original agreement there was no provision that extras should be in writing.)

(3) Extras had to be approved by the Veterans Administration.

Paragraph 23 was amended to give Prudential Federal discretion as to the manner and amounts of payments to Cassady, subject, however to the following provision:

> "In no event, however, shall the payments be less than those prescribed in this paragraph 23 prior to this amendment."

At no time was there any agreement that failure to make timely payments should be excused. On the contrary all of the contractual provisions specifically required payments according to a schedule based on course of construction. It should also be observed, that there is nothing in the supplemental agreement wherein or whereby any party thereto admits or agrees that Felt had performed its obligations in accordance with the primary construction contract. And Felt itself, at page 22 of its brief, admits that there were breaches.

It was of course, necessary that the Hartford consent to that portion of the supplemental agreement

wherein the time for completion by Cassady was extended. Had the consent of the Hartford not been obtained, it would have been exonerated from liability under the bond under familiar principles of suretyship law. Likewise, it was advisable, if not absolutely necessary, to obtain the Hartford's consent to the other modifications in the primary construction contract so that there could be no question of its being exonerated by reason of changing its terms. However, the Hartford's concurrence in this agreement was strictly and carefully limited to those matters. It specifically did not agree that Prudential Federal had performed all of its contractual obligations, nor did it admit that any other party had performed its contractual obligations, nor did it waive any of the rights for which it had contracted under the specific terms of its bond. Antecedent breaches were in no wise excused and there is nothing in the record to show that at the time of the Supplemental Agreement the Hartford had knowledge of such breaches.

Felt has suggested that by allowing the cost of renting a power generator as an offset against Felt's judgment, Felt's breach in failing to provide a power connection at the inception of the project is thus rectified. This is analogous to suggesting that a blood transfusion, administered after the death of the patient, rectifies the negligence of the physician in failing to give it at the time of surgery. At the beginning of the project, funds were sorely needed. A relatively small amount of money would have kept the project going smoothly. But once it had turned into a lemon, no amount of money could have saved it. Like a small cancer, easily eradicated in

its initial phases, this project was neglected by the doctor (Felt) until the cancer metastasized throughout the body of the victim. By then major surgery could not cure the patient. Any medicine administered at that late date could have only a mild pallative effect.

POINT V.

FELT IS BARRED FROM MAINTAINING ITS ACTION AND FROM MAINTAINING THIS APPEAL BY THE PROVISIONS OF SECTION 16-9-3, U. C. A., 1953.

In meeting the contentions made under Point VI of our original brief, Felt ignores completely the terms and provisions of Sec. 16-9-3, U.C.A. 1953. Felt seeks to circumvent our argument by contending that in filing this law suit and prosecuting this appeal, it is not engaging in business in Utah. That is entirely beside the point. When Felt entered into this promotion for the construction of 100 homes, it was beyond the peradventure of any doubt engaging in business in Utah. This it recognized itself and took the steps to qualify to do business in this state. Having done so, it was, for the time it remained properly qualified, entitled to all of the rights and privileges of any other corporation lawfully doing business in this state. However, when Felt's franchise was forfeited, it forfeited whatever rights it had accrued up to that time. Sec. 59-13-61, U.C.A., 1953. One of those rights was the right to bring actions in the Utah courts. The disabilities of non-complying foreign corporations are specifically set forth in Sec. 16-9-3, U.C.A., 1953. One of those disabilities is clearly and unequivocally the right to sue, prosecute or maintain any

action or suit in any of the courts of this state on any claim arising out of, or growing out of any contract, agreement or transaction, made or entered into in this state by such corporation. The language of the statute is clear and unequivocal.

The cases cited by Felt, do not in the least support or tend to support its position. The case of *George R. Barse Livestock Company* v. *The Range Valley Cattle Co., et al.,* 16 Ut. 59, 50 Pac. 630, simply holds that a foreign corporation not doing business in this state, which acquired, outside of this state, a *chose en action* against the defendant, a resident of this state, could bring its action in the Utah courts without qualifying as a foreign corporation. The case of *Marchant v. National Reserve Co. of America,* 137 Pac. (2d) 331, simply discussed what does and does not constitute the doing of business in this state, and says nothing whatsoever as to the disabilities of noncomplying foreign corporations, and particularly as to their right to use the Utah courts. Neither case is of any assistance whatsoever in solving the problems in the case at bar.

POINT VI.

HARTFORD DID NOT ADMIT IN ITS ORIGINAL BRIEF THAT PRUDENTIAL FEDERAL WAS ENTITLED TO RECOVER ANY DAMAGES WHATSOEVER.

In our original brief, we stated that "the amount of damages awarded to . . . Prudential Federal and Felt" was not an issue. We made the statement simply to explain to the court why we did not detail the facts upon which those plaintiffs' losses were claimed. We certainly

did not intend to admit, and we are quite amazed that anyone would believe that we admitted, by this statement, that the plaintiffs were entitled to damages in some amount. However, Prudential Federal has seized upon this statement with such vigor and has referred to it so many times in its brief, that we feel it appropriate to clarify any doubt or ambiguity which might exist.

WE DO NOT ADMIT THAT PRUDENTIAL FEDERAL OR ANY OTHER PLAINTIFF IS ENTITLED TO RECOVER DAMAGES IN THESE CASES. We most certainly would not have appealed and prepared these elaborate briefs had we intended to make any such admission. All we meant by the statement in our original brief, was that we do not desire, on this appeal, to attack the formula by which the court calculated the damages, the court having first found that the plaintiffs were entitled to recover damages. We do not necessarily admit that the court's formula was correct. All we say, is that right or not, we are not questioning it on this appeal. What we are contending is that the plaintiffs should not have been awarded any damages, and that judgment should have been rendered in each case in favor of the defendant. That is what we contended below, and what we contend here. We trust that the foregoing will serve to eliminate or clarify any ambiguity which heretofore existed as a result of the statement made in our original brief.

POINT VII.

HARTFORD DID NOT CLAIM THAT THE OBLIGATIONS OF THE OBLIGEES WERE JOINT AND SEVERAL.

In order to demonstrate that its construction of the bond is the correct one, Prudential Federal suggests as an alternative construction an interpretation which it characterized as absurd. We agree. This interpretation is stated on page 65 of Prudential Federal's brief to be Hartford's theory. This we disclaim. We have never contended, and we do not now contend, that the three obligees on the bond had joint and several obligations to make payments to Cassady. What we do contend, and what the bond plainly provides, is that in the event payments are not made to Cassady in accordance with the terms of the primary contract, that the surety is exonerated from liability to each of the obligees on the bond. Plainly the Morningside Heights building project could not succeed unless everyone interested in it faithfully performed his obligations. Quite obviously Felt and Prudential Federal, and to a lesser degree, the Title Company, had it within their power to destroy the success of the project by not complying with their contractual agreements. Hartford certainly would not have undertaken to secure performance by Cassady without at the same time contracting for full performance by all of the other parties. To have done otherwise would have been little short of madness. In fact Hartford agreed to write this bond only after a long period of negotiation. While the Hartford did not require, nor did any contractual instrument require, that either Prudential Federal or the Title Company, guarantee payment to Cassady by Felt, Hartford, in clear and unequivocal language, limited its liability, and stated that it would not be liable if pay-

ments were not made "in reasonable compliance with the terms of" the construction contract, or if the other obligees failed to perform their obligations. In light of the circumstances under which the parties contracted, this provision seems not only reasonable but indispensable.

CONCLUSION

It is respectfully submitted, that the plaintiffs have failed to meet the arguments advanced by the Hartford in its original brief; that there is no merit to Felt's appeal; and that the judgment of the trial court in each case should be reversed with directions to enter judgment in favor of the defendant and against each of the plaintiffs, no cause of action.

Respectfully submitted,

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