1987

# Felt Syndicate, Inc. v. Hartfort Accident & Indemnity Company : Brief of Appellant

Utah Supreme Court

BRIEF

# IN THE SUPREME COURT OF THE STATE OF UTAH

FELT SYNDICATE, INC.
*Plaintiff and Appellant,*

— vs. —

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

Case No. 8736

## Brief of Felt Syndicate, Inc. Appellant

WOODROW D. WHITE and
C. PRESTON ALLEN
*Attorneys for Appellant*
*Felt Syndicate, Inc.*

INDEX

## CASES CITED



## SECTIONS CITED



## TEXTS CITED

# IN THE SUPREME COURT OF THE STATE OF UTAH

FELT SYNDICATE, INC.
*Plaintiff and Appellant,*

— vs. —

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

Case No. 8736

# Brief of Felt Syndicate, Inc. Appellant

## STATEMENT OF FACTS

For the purposes of this brief, we will refer to the parties as Felt, Hartford, Cassady, Title Company and Prudential which are the respective designations used in the transcript and in the briefs of counsel heretofore filed in this consolidated proceeding. In addition, we will use the transcript and record designations set forth on page 3 of Hartford's brief.

By reason of the consolidation of these cases, the facts have been rather completely stated in the briefs submitted by Hartford, Prudential and the Title Company. Due to the particular problem applicable to the appeal of Felt, some duplication, we feel, is necessary.

Felt, during the early part of 1950, acquired a tract of land in Salt Lake County, and platted and subdivided this land prior to July 19th, 1950, under the name of "Morningside Heights." (Ex. Pr. 2.) On July 19th, 1950, Felt entered into a written agreement with Cassady which generally provided that Cassady would cause to be constructed one hundred homes on the lots of the subdivision (Ex. Pr. 2). The time within which Cassady was to complete the construction of the homes and the maximum cost for the construction of each home was specifically treated in this agreement (Ex. Pr. 2). Additional provisions recited that out of the amounts derived from the sale of the homes and lots, Cassady would receive its construction costs, Felt would receive reimbursement for land and street improvements together with its *miscellaneous administrative and legal expenses,* and any net profit would then be divided equally between Felt and Cassady (Ex. Pr. 2).

It was further provided on page 3 of the agreement of August 10th, 1950, and in the schedules thereto attached, that Felt would receive directly from the disbursing agent specifically set forth amounts as "Felt Miscellaneous" funds (Ex. Pr. 8). It has been stipulated that the amount which Felt was not paid on this miscellaneous account totaled $17,173.43 (Tr. 20).

In May of 1950, Felt entered into an agreement with Wright-Wirthlin Company, a realtor in Salt Lake, to sell the one hundred homes in Morningside Heights (Ex. H-31). Prior to March 22, 1951, the Wright-Wirthlin Company had sold all of the homes and had due and owing it from Felt, $19,100.00 of the agreed sales commission (Ex. H-31). On the 22nd day of March, 1951, Felt entered into an agreement entitled "Assignment and Agreement" wherein it was the announced intention of the parties to thereby "secure the said obligation" owing to Wright-Wirthlin, and Wright-Wirthlin, in consideration thereof, covenanted to "forego any action or immediate procedure" against Felt on the account (Ex. H-31).

It is pertinent to note also that by the agreement, Wright-Wirthlin *did not credit the account due from Felt for any sums not actually received* by Wright-Wirthlin, and it was expressly announced in paragraph (5) that nothing in the agreement should "be construed to waive or impair any right Wright-Wirthlin Company may have to the full and complete sum" owing to it by Felt (Ex. H-31).

In its answer, Hartford interposed several defenses, none of which raised the issue that Felt was not the real party in interest as to the miscellaneous account, and at no time during the two pretrials was an issue framed or a defense made that Felt was not the real party in interest as to the miscellaneous account.

At the conclusion of the trial in the Lower Court, the respondent here, Hartford Accident and Indemnity Company, for the first time moved to strike a portion of the claimed damages of Felt which related to the account labelled "Felt Miscellaneous Fund" on the ground that the appellant was not the real party in interest thereto. This motion was granted by the Lower Court, and the sum of $14,761.80, together with interest at 6%, was thereupon excluded from the judgment awarded to this appellant. The appeal here taken by Felt is based upon the Lower Court's ruling on the aforesaid motion.

## STATEMENT OF POINTS—APPELLANT'S BRIEF

### POINT I.

AN ASSIGNOR WHO HAS ASSIGNED A CONTRACT RIGHT TO HIS CREDITOR FOR SECURITY PURPOSES ONLY IS A REAL PARTY IN INTEREST IN AN ACTION TO ENFORCE THE CONTRACT RIGHT.

### POINT II.

A MOTION TO ABATE OR DISMISS A CAUSE OF ACTION ON THE GROUND THAT THE PLAINTIFF IS NOT A REAL PARTY IN INTEREST IS WAIVED BY DEFENDANT IF INTERPOSED FOR THE FIRST TIME AT THE CLOSE OF THE EVIDENCE.

### POINT I.

AN ASSIGNOR WHO HAS ASSIGNED A CONTRACT RIGHT TO HIS CREDITOR FOR SECURITY PURPOSES

ONLY IS A REAL PARTY IN INTEREST IN AN ACTION TO ENFORCE THE CONTRACT RIGHT.

On the 22nd of March, 1951, Felt, the appellant here, was indebted to Wright-Wirthlin Company for real estate commissions on the sale of the lots in the subdivision in the sum of $19,100.00. Felt contends that the money with which to discharge this just obligation was not available because Hartford's principal, Cassady, had not fulfilled its construction contract, thereby prohibiting the disbursement of the stage of completion advances.

An "Assignment and Agreement" was entered into between Wright-Wirthlin and Felt on the 22nd of March, 1951, from which it is evident the following facts then existed (Ex. H-31):

1. That Wright-Wirthlin had theretofore sold all of the 100 lots in the subdivision pursuant to the contract between Wright-Wirthlin and Felt.
2. That the contract commission agreed to be paid to Wright-Wirthlin from Felt was in the total sum of $30,000.00.
3. That there was then long past due and owing to Wright-Wirthlin from Felt, the total sum of $19,100.00.
4. That Wright-Wirthlin was threatening Felt with court action to enforce payment of the commission due. (Para. 4, Ex. H. 31.)

An inspection of the "Assignment and Agreement" discloses:

1. That the parties, by making the assignment of the "Felt Miscellaneous Fund," intended only

   ". . . to secure the said obligation . . ."
   between Wright-Wirthlin and Felt. (See first recital, Ex. H-31.)

2. That only 89.6% of the amounts received thereafter *in the miscellaneous fund* would be transferred to Wright-Wirthlin to apply on the obligation due from Felt.

3. That the mere "assignment" of the amounts to become due the miscellaneous fund *effected no reduction in the amount due from Felt to Wright-Wirthlin.* (See para. 5, Ex. H-31). Consequently, Felt could only reduce its obligation owing Wright-Wirthlin if and as disbursements from the miscellaneous account were made.

4. Felt at all times retained free from the assignment for security purposes, 10.4% of the miscellaneous account.

5. Wright-Wirthlin, with its obligation due from Felt secured by the "Agreement and Assignment," agreed to withhold court action to collect the obligation (Para. 4, Ex. H-31).

It is of further probative value, in light of the law to be hereafter discussed, that Wright-Wirthlin *re-assigned* their interest in the miscellaneous account to Felt on the 20th of December, 1956, over three months prior to the date upon which the evidence was closed in this proceeding and over three months prior to the date upon which Hartford, for the first time, raised its defense that Felt was not the real party in interest to 89.6% of the miscellaneous account.

May we repeat, that the Lower Court in its judgment found that the "Felt Miscellaneous Fund" *was a proper portion of Felt's damages* proximately arising from the many substantial contract breaches by Cassady, but further found that Felt was not the "real party in interest" as to 89.6% of the miscellaneous account. The lower court excluded $14,761.80 from the account, and awarded Felt judgment which included only the remaining 10.4% of the miscellaneous account.

Felt's position, initially, is that under the Utah Rules of Civil Procedure, *it was the real party in interest* as to the entire miscellaneous account even though a security assignment had been made to Wright-Wirthlin.

Prior to the adoption of real party in interest statutes, the common law rule was that an assignee of a chose in action could only bring suit in the name of his assignor. See *39 Am. Jur. 871.* One of the primary purposes for the adoption of the real party in interest statutes is to extend the right to maintain a suit to the assignee. (See *39 Am. Jur. 871*). This extension of the right to maintain the action, however, does not, per se, bar the remedy of the *beneficial* assignor:

> "It is often stated to be the general rule that the equitable owner of a claim sued upon may sue as the real party in interest . . ." (39 Am. Jur. 871.)

Most text writers agree that real party in interest statutes are designed to *authorize and allow* those parties who hold the *beneficial interest* but not the legal

title, to a document or chose or right, to maintain the action. The exceptions in the real party in interest statutes *extend* the right to sue to the holders of the legal title and do not remove the right of the equitable or beneficial owner to maintain the action. This interpretation has been adopted by most courts, including the courts of Utah, as we shall later show. *39 Am. Jur. 872.*

*Rule 17(a) of the Utah Rules of Civil Procedure* provides:

> "Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute *may* sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Utah." (Emphasis ours)

The intent of the foregoing rule seems evident from its plain provisions — this is, that those interested in the proceeding are the proper parties to bring the matter before the court.

The foregoing construction has been placed on the rule in the State of Utah for many years and has been the subject of consideration before this court on numerous occasions.

For example, it seems quite well established that *beneficiaries under a trust* may bring an action in their own names as the real parties in interest when they are to be benefited or directly concerned with the outcome of the proceeding. See *Salina Canyon Coal Co. v. Klemm, et al.,* 76 Utah 372, wherein it was stated by this court:

> "It will be noted (from the statute) that the right of certain fiduciaries to sue is an exception to the general mandate that every action must be brought in the name of the real party in interest. The privilege conferred upon the fiduciaries to sue is permissive. *Nothing in the statute prohibits the real party in interest from suing in his own name in any proper case.*"

This court has further spoken on the subject in considering the status of a *third party beneficiary.* See *M. H. Walker Electric Company vs. American Surety Company of New York,* 60 Utah 435, wherein this court stated:

> "This much, however, can be said with reasonable assurance: That whenever it appears from a contract that there is a clear intent to benefit a third party, whether specifically named in the contract or not, such person, ordinarily, may sue in his own name for the enforcement thereof or for the benefits arising therefrom. This general proposition, we believe, is well sustained by the great preponderance of judicial opinion in the several states of the Union."

Based upon the foregoing quoted rule and upon the decisions of this court, we deem it fairly well settled that it is not essential in maintaining an action that the

bare legal title be fixed in the plaintiff. We deem it equally well settled that if the plaintiff is to be *benefited* from the results of the litigation, such plaintiff is a real party in interest in the proceeding.

The facts here, without contradiction, disclose that Felt was indebted to Wright-Wirthlin in the sum of $19,100.00 prior to the execution of the "Agreement and Assignment" and that after the "Agreement and Assignment" was executed and delivered to Wright-Wirthlin, Felt Syndicate was *still obligated* to Wright-Wirthlin in the same amount. The "Agreement and Assignment" did not therefore effect a discharge of the obligation due Wright-Wirthlin by Felt nor in any way result in a reduction of the obligation. The amount due Wright-Wirthlin was a continuing obligation from the date of the "Agreement and Assignment" up to and including the date the lower court entered its judgment herein. Of further significance is the fact that both parties announced in the agreement that it was made only to *secure* the obligation due Wright-Wirthlin. As such, Felt was at all times directly pecuniarily interested in the miscellaneous account, for the collections, if any, on the miscellaneous account would directly affect Felt's continuing obligation to Wright-Wirthlin. As such, Felt should be deemed to be the real party in interest to the entire miscellaneous account.

We can see no significant difference between the interest of Felt in this miscellaneous account and the interest of the third party beneficiary in the *Walker case,*

*supra,* nor in the interest of the beneficiaries in the trust before this court in the *Salina Canyon Coal case, supra.*

A close analogy is set forth in the case of *Dickey vs. Porter, et al.,* 101 S.W. 586. In that case a plaintiff had secured a loan with the bank by assigning to the bank a tax bill. The court there held that the pledgor, the one who gave the security interest, was a real party in interest in the proceeding. In appropriate language the court there said, p. 593:

> "By his note to the bank, the plaintiff became absolutely indebted to the bank, whether the lien was valid and enforceable or not. If he had permitted that statute of limitation to run, and the tax bill should thereby have become valueless as a security, his obligation to the bank would have still remained absolute. The bank was taking no step to enforce the lien, and, having brought this suit, it is obvious that it (the assignor) was the plaintiff who was to be benefited or injured by the judgment rendered in this case. The general title to the tax bill remained in the plaintiff at the date of the commencement of the suit, subject only to the lien of the bank."

It was further noted by the court in the case of *Ball-Thrash & Co. v. McCormick,* 78 S.E. 303, that a pledgor could maintain an action on a note and mortgage held by the pledgee and in so doing it quoted with approval the case of *Wells vs. Wells,* 53 Vt. 1, wherein that court said:

> " 'And here it is to be remarked that the fact that the note and mortgage were held by the defendants as collateral did not stand in the way of the orators proceeding either by suit at law

on the note or by foreclosure on the mortgage, if they deemed it for their interest to have the note or the mortgage, or both, enforced earlier than the defendants saw fit to proceed in that behalf. See Am. Law Rev Oct. 1880, p. 693. The court would see to it that the rights and interests of the pledgee were protected in reference to the collateral at the same time that the pledgor was acting in regard to his own existing reversionary interest in the pledge, by the proceeding to enforce it, as against the debtor in the pledge.' The writer of the article in the American Law Review, referred to in that case, states the law to be that the pledgor has an interest in the thing deposited in pledge, and is not restricted to the remedy of tender or repayment, and the pledgee will be protected in his rights by an order that he shall be first paid out of the fund derived from the sale of the property pledged or its collection, if a note.''

May we further draw the court's attention to the fact that over three months prior to the close of the evidence in this proceeding all of the rights in the miscellaneous account assigned to Wright-Wirthlin had been re-assigned to Felt and consequently Felt has at all times since the 20th of December, 1956, been in a position to directly discharge the total obligation which Hartford has under its bond.

Based upon the statute and the foregoing authorities Felt respectfully submits that it is and at all times has been the real party in interest to the entire miscellaneous account, and that the lower court erred when it excluded the sum of $14,761.80, together with accrued interest, from the judgment awarded to Felt.

## POINT II.

A MOTION TO ABATE OR DISMISS A CAUSE OF ACTION ON THE GROUND THAT THE PLAINTIFF IS NOT A REAL PARTY IN INTEREST IS WAIVED BY DEFENDANT IF INTERPOSED FOR THE FIRST TIME AT THE CLOSE OF THE EVIDENCE.

No defense was made in the answer filed by Hartford that Felt was not the real party in interest to all of the miscellaneous account. Further, no motion was made between the date of the answer and the first pretrial that Felt was not the real party in interest as to the miscellaneous account, nor was such an issue raised at either of the two pretrial proceedings by Hartford. The first time that Hartford made mention that it relied on a defense that Felt was not the real party in interest to the miscellaneous account was at the close of Felt's evidence. The lower court ruled in favor of Hartford upon the motion being made and excluded $14,761.80, which was 89.6% of the miscellaneous account, on the ground that as to this portion of the miscellaneous account, Felt was not the real party in interest.

Felt contends that this affirmative defense of Hartford's had been waived.

It is provided in *Rule 8(b) of the Utah Rules of Civil Procedure* that:

> "A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies . . ."

*Rule 8(c) of the Utah Rules of Civil Procedure* provides:

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, *and any other matter constituting an avoidance or affirmative defense . . .*" (Emphasis ours)

And, further, *Rule 12(h)* of the *Utah Rules of Civil Procedure* provides:

> "*A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply,* except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject-matter, the court shall dismiss the action.

The foregoing language of our rules seem clear and unambiguous and is designed to give proper and timely notice to a plaintiff of the defenses which he must be prepared to meet. It further seems settled that

if affirmative defenses are not pleaded or interposed by a motion that they are thereby waived.

Here, the record is uncontroverted that no defense was raised in the pleadings or interposed by a motion on behalf of Hartford that the plaintiff here was not the real party in interest to the entire miscellaneous account. Even during the two pretrials had before Judge Ellett, no issue was even mentioned by Hartford that it would defend upon the ground that Felt was not the real party in interest. Not until the close of Felt's evidence was mention thereof made.

We, therefore, believe that the plain language of *Rule 12(h) of the Utah Rules of Civil Procedure* is properly applicable and that by reason thereof Hartford waived its defenses and objections that Felt was not the real party in interest to the entire miscellaneous account.

The foregoing rules are rules of essential justice for they permit parties who believe their rights are properly being pursued and represented to rely upon the rules as they are plainly written and there would seem to be no doubt here that if Hartford had properly raised the defense of real party in interest during the four years in which these proceedings have been before the court that Wright-Wirthlin could have come in and made itself a party plaintiff if the court had then granted Hartford's motion. It is significant also to note that this Supreme Court has previously treated this problem in the case of *Fritz v. The Western Union Telegraph Company and The Rio Grande Western Railway*

*Company,* 25 Utah 263, 280, wherein the court had before it the timeliness of an objection made during the course of the trial that an assignee was not a real party in interest. This court therein stated that:

> ". . . this objection (that the plaintiff was not the real party in interest) was urged too late, and must be held to have been waived. 'The objection that the plaintiff in an action is not the real party in interest, as required by the Code, when available by way of defense, must be raised by demurrer or answer, or it will be considered to have been waived.' 15 Enc. Pl. and Prac., 713; Rev. St. sec. 2966; Smith v. Hall, 67 N.Y. 50; Spooner v. Railroad Co., 115 N.Y. 30, 21 N.E. 696; Trust Co. v. Brown, 59 Mo. App. 461."

The spirit and intent of the *Fritz case, supra,* is plainly incorporated in the present Rules of Civil Procedure and we respectfully submit that in face of the Rules and the Fritz case the lower court here has plainly erred in excluding $14.761.80 of the miscellaneous account due this plaintiff.

## ANSWER OF FELT SYNDICATE, INC., APPELLANT, TO THE BRIEF FILED BY HARTFORD ACCIDENT AND INDEMNITY COMPANY, RESPONDENT.

*Special Note:* This case was consolidated for appellate purposes with cases Nos. 8719 and 8720. The respondent here, Hartford Accident and Indemnity Company, has filed its consolidated brief in all of the cases mentioned. The remaining portion of this brief will, therefore, be devoted to answering the brief of Hartford.

## STATEMENT OF POINTS IN ANSWER TO HARTFORD BRIEF

### POINT I.

FELT DID NOT COMMIT ANY SUBSTANTIAL OR MATERIAL BREACHES OF THE CONTRACT.

A. THE TRIAL COURT'S FINDINGS NOS. 18 AND 20, ALL TO THE EFFECT THAT THERE WERE NO SUBSTANTIAL BREACHES OF THE CONTRACTS BY FELT, ARE SUPPORTED BY THE EVIDENCE.

1. The Lack of Funds Was Due to Cassady's Breaches and Not to Any Alleged Substantial Breach by Felt.

2. The Court's Finding that the Assignment of the Miscellaneous Account Due Felt Was Not a Substantial Breach of the Contracts is Supported By the Evidence.

3. Hartford Was Allowed an Offset for Felt's Failure to Provide a Power Connection to Cassady and the Finding By the Court That Felt's Failure to Supply Electrical Power Was of No Consequence is Supported By the Record.

4. Hartford Alleges That Cassady Was Not Reimbursed For Extras But the Record Would Not Support the Award For Other Extras.

### POINT II.

THE PARTIES TO THE PRIMARY CONSTRUCTION CONTRACT AND THE CONTRACT BOND COMPRO-

MISED AND SETTLED ANY AND ALL ALLEGED PRIOR BREACHES OF CONTRACT BY THE SUPPLEMENTAL AGREEMENT OF FEBRUARY 16, 1951.

## POINT III.

HARTFORD IS ESTOPPED TO DENY THAT THE SUPPLEMENTAL AGREEMENT OF FEBRUARY 16, 1951, COMPROMISED AND SETTLED PRIOR ALLEGED BREACHES BY FELT AND PRUDENTIAL.

## POINT IV.

FAILURE TO PAY FRANCHISE TAXES AFTER A FOREIGN CORPORATION CEASES TO DO BUSINESS IN UTAH WILL NOT BAR IT FROM THEREAFTER MAINTAINING AN ACTION IN UTAH COURTS.

## ARGUMENT

In its brief, Hartford has totally ignored the oft repeated appellate rule that a successful plaintiff is entitled to have this court consider all of the evidence and every fair inference to be derived therefrom in the light most favorable to him. (*Beck v. Jeppsen,* 1 Utah 2d, 127, 262 P. 2d 760; *Cutler Association vs. De Jay Stores,* 3 Utah 2d 107, 279 Pac. 2d 700.) After attacking the trial court's findings with controverted evidence gleaned merely from Cassady, Hartford's bond principal who was charged with supervision of the project, Hartford proceeds to interpret the evidence to exonerate its principal from fault concerning the project's failure.

From this erroneous basis, Hartford then places the blame on Felt and Prudential Federal and applies general principles of law to demonstrate error in the lower court.

The complete absence in Hartford's brief of an analysis of the record to demonstrate that the judgment of the lower court was supported by substantial evidence graphically indicates the absence of substance in Hartford's position here. It is well settled by this court that the findings and conclusions of the lower court, if supported by competent evidence, will not be disturbed on appeal. The foregoing is the only issue before this court insofar as Hartford's affirmative position is concerned.

## POINT I.

### FELT DID NOT COMMIT ANY SUBSTANTIAL OR MATERIAL BREACHES OF THE CONTRACT.

A. THE TRIAL COURT'S FINDINGS NOS. 18 AND 20, ALL TO THE EFFECT THAT THERE WERE NO SUBSTANTIAL BREACHES OF THE CONTRACTS BY FELT, ARE SUPPORTED BY THE EVIDENCE.

(Note: Felt adopts here the applicable portions of Points I and II argued by the able counsel for Prudential, in their brief. In addition Felt sets forth the following answer to Hartford.)

1. *The Lack of Funds Was Due to Cassady's Breaches and Not to Any Alleged Substantial Breach by Felt.*

Hartford misinterprets the significance of Finding No. 18, which is as follows:

> "Any delay in disbursing the mortgage proceeds by Prudential at the commencement of work in the summer of 1950 on the Morningside Heights project was caused by Cassady prematurely commencing work on the project before the execution, delivery and recording of mortgages executed by the veteran borrowers. Cassady knew that Prudential would not disburse the mortgage proceeds until mortgages were properly executed and recorded. The time lag thereby occasioned was the direct and immediate result of Cassady's own action in commencing construction work before mortgage funds were available under the terms of said several contracts. Cassady assumed this risk of his own volition and choice."

The purpose of this finding is not, as Hartford would infer, that Cassady was obliged to await the recordation of the final mortgage of the applying veterans, but merely that Cassady knew of the conditions of obtaining reimbursement but chose to disregard the interests of all parties and continue construction according to his own whim.

By his own testimony, Cassady knew that the success of the entire project depended upon the loans being made after mortgages were recorded. (T. 299). He was made fully aware of the fact that continued construction was contingent upon sales being made, mortgages being recorded and delivery being made to the purchasers when the first disbursal was made in August, 1950. (T.

262). He checked the records of sales and the progress of financing of the individual houses every day at the Felt Syndicate offices. (T. 322) Only for the first thirty-day period was the sales program unsynchronized with the construction program and Cassady was informed of this so that he could exercise his own judgment as to which lot to work upon. (T. 321-322) After this short period, the sales program was brought into line with construction. (T. 348) Cassady recognized that in a project of this type it is necessary for a contractor to invest considerable capital in order to efficiently operate during the period preceding the commencement of progress payments. (R. 295) Despite the knowledge that he did not have sufficient funds to support a program of this type, Cassady chose to work on houses which were not yet sold rather than to aid all parties in obtaining the funds which he knew would be available from loans made on houses which were sold. It is significant to also note that not a single dwelling was ever completed by Cassady even though $725,735.27 was paid to him or in his behalf for actual contruction costs. (Ex. F. 10)

When the mortgages were recorded, an inspection was made of the homes to determine the extent of their completion and thereafter, funds were disbursed accordingly. (T. 366)

It is undoubtedly true that in order to complete the project in the quickest and most inexpensive manner, the work was planned to move forward on a wholesale basis. However, the record shows that innumerable

delays in construction caused deterioration of the completed work (T. 153-155, Ex. F-25), that sales previously made were cancelled (T. 39, 62, 323), and that in some homes, even the preliminary work failed to pass inspection (Ex. F-24). In a letter written as late as June 13th, 1951, Cassady wrote to one of his subcontractors (Ex. H-33):

> "I have had numerous complaints from you regarding the lack of materials available on the job. In this I concur in that at times we have had shortages of various items. However, at *no time has there ever been a material shortage* which would ever necessitate the laying-off of men *nor prevented the hiring of additional men if the work were progressing systematically.* This has been explained to you in detail." (Emphasis ours)

There were breaches on the part of the parties to the agreement, some of which were unavoidable at the inception of the project, but because this was a profit-sharing agreement the exhibits show that each was making an effort to correct its own faults, make adjustments for the breaches of others, and continue with the contract. Thus, the evidence justifies the court's finding that Cassady had within his control the means by which the entire project would have profited. Therefore, the short delay in the sales program during the first thirty-day period was insubstantial and not the proximate cause of the loss at all, and the lower court so found.

The lower court's Finding No. 20 is as follows:

> "Felt did not breach its contractual obligations to Cassady or to Hartford in any substantial

> manner and any differences between them were resolved by extensions of time granted to Cassady Company, Inc. and by the Supplemental Agreement (PR6) between the parties entered into February 16, 1951."

Hartford points out that Felt had an obligation to Cassady to pay according to the course of construction and that said obligation was not qualified as to recording mortgages, sales program, or any other consideration. It neglects to point out that since this was a profit-sharing agreement whereby the contractor, as well as the owner, hoped to achieve substantial ultimate gain, they were disposed to, and did in fact by their conduct, disregard inconsequential and rectifiable breaches and did continue with their contract.

The period of delay in payments to Cassady, as demonstrated by Ex. H-32, a letter from Cassady to Felt, *occurred very early* in the project. The mortgage recording delays, however, were under control by the middle of September, 1950 (T. 348); by December, 1950, all loans had been closed and mortgages recorded so that the proceeds of all loans were available for disbursement to Cassady as the work progressed (T. 66, T. 105-6). Even under these admitted facts, Cassady still did not see fit thereafter to complete one of the one hundred homes. This was the very crux of the money problem.

2. *The Court's Finding That The Assignment Of The Miscellaneous Account Due Felt Was Not A Substantial Breach Of The Contracts Is Supported By The Evidence.*

A real estate firm, known here as Wright-Wirthlin, sold the 100 lots under a commission contract with Felt. Felt contends that by reason of Cassady's default which resulted in the unavailability of funds from the project, it was unable to discharge the commission obligation to Wright-Wirthlin. After many calls to Prudential Federal (T. 86) and apparently after threatening Felt with court proceedings, Felt assigned its interest *for security purposes only* to Wright-Wirthlin (Ex. H-31). The only contention Hartford made that this assignment was a material breach of the contract was that it effected, in some unascertained way, a disability to enter into a modified contract whereby certain mortgage funds in the hands of Prudential would be applied to the project. A close reading of the transcript citations in Hartford's brief will disclose that only one of the stockholders of Felt ever assented to the application of the funds to the construction project. It seems extremely abstract to excuse Cassady's previous continuing and substantial breaches of the contract by a simple diversionary argument as to the executory application of funds by an agreement which was never executed. The court was of the opinion that this assignment by Felt was of no consequence when compared to Cassady's substantial and material breaches and this record certainly supports the conclusion of the lower court in this regard.

3. *Hartford Was Allowed An Offset For Felt's Failure To Provide A Power Connection To Cassady And The Finding By The Court That Felt's Failure To Supply Electrical Power Was Of No Consequence Is Supported By The Record.*

One of the impressive things about Hartford's brief is the way it is "grabbing at straws" to save itself from the judgment, one of the prime examples of which is the way it complains about the failure of Felt to supply the power to the project. Felt admits that power was unavailable when construction was commenced, but the record fully supports the finding of the lower court that such failure was of no consequence. Mr. B. D. Scott testified that at all times during the period of construction portable power generators were available for Cassady to use on the project and *Cassady did obtain a portable power generator to supply all of his power needs.* (T. 313-314) In addition, the Court has allowed an offset for the small amounts expended by Cassady for this additional cost. (Felt R. 43)

4. *Hartford Alleges That Cassady Was Not Reimbursed For Extras But The Record Would Not Support The Award For Other Extras.*

The only extra found by the Court to be of any merit was the portable power generators previously discussed. The only other extras which Cassady tacitly complains of not being reimbursed for were all of such a nebulous nature as to not warrant discussion. Suffice it to say, that they were all required by the Veterans' Administration to meet the building requirements; that Cassady was fully informed of these requirements by reason of his construction experience prior to the time he signed the contracts; and that even under these circumstances Cassady still did not finish any of the homes to meet the requirements of the Veterans' Ad-

ministration so that all parties could be saved from their damages.

This whole line of counter accusations, arising as it does after suit is brought some years after the claimed breaches, recalls the language of *Larsen v. Knight,* 120 Utah 265, 233 P. 2d 365:

> "A party claiming a right ought not to appear to acquiesce in non-performance by the other party until the time has gone by for such performance and then claim damages."

## POINT II.

THE PARTIES TO THE PRIMARY CONSTRUCTION CONTRACT AND THE CONTRACT BOND COMPROMISED AND SETTLED ANY AND ALL ALLEGED PRIOR BREACHES OF CONTRACT BY THE SUPPLEMENTAL AGREEMENT OF FEBRUARY 16, 1951.

## POINT III.

HARTFORD IS ESTOPPED TO DENY THAT THE SUPPLEMENTAL AGREEMENT OF FEBRUARY 16, 1951, COMPROMISED AND SETTLED PRIOR ALLEGED BREACHES BY FELT AND PRUDENTIAL.

(Felt under these two foregoing points adopts the argument made by the able counsel for Prudential under their Points III and IV, and, in addition thereto, presents the following:)

Felt deems it significant that Hartford has not in its appeal brief traversed the findings of the lower

court that its principal, Cassady, waived any alleged breaches of the plaintiffs; nor that Cassady and Hartford compromised and settled all alleged contract breaches occurring prior to the Supplemental Agreement of February 16, 1951; nor that Hartford was estopped by said agreement from denying such compromise and settlement. It would seem admitted that these findings of the lower court are supported by adequate and competent evidence and would, therefore, fully justify an affirmation of the lower court's findings.

The Supplemental Agreement, Exhibit PR6, was entered into by the parties as an amendment to their original contracts, Exhibits (PR2) and (PR8), in an attempt to rejuvenate the failing project. Cassady stated that his main purpose for executing this Supplementary Agreement was to obtain additional time for completing his contract. (T. 253) At that time all the loans had been closed and mortgages recorded. (T. 105) Consequently, all of the money under the contracts would have been available at that time if Cassady would have then performed pursuant to the terms of all of the agreements.

The Supplementary Agreement recited, inter alia:

> "WHEREAS, conditions have arisen whereby the parties deem it necessary and expedient to amend, modify, supplement and adjust certain provisions of the Primary Contract, and certain of the provisions of the Disbursing Contract, as amended by the supplemental agreement of August 22, 1950.

"NOW, THEREFORE, in consideration of the premises and of the mutual promises and agreements of the parties hereto and of the benefits to be mutually derived from the amendments, modification and adjustment of the aforesaid contracts, the parties agree hereto as follows:

ARTICLE III

"3. CASSADY hereby irrevocably admits that it has secured from SYNDICATE and ACCOUNTANTS an accounting of the proceeds of all funds paid by PRUDENTIAL to ACCOUNTANTS. CASSADY, PRUDENTIAL and SYNDICATE each do hereby confirm and approve all of said disbursements by ACCOUNTANTS to the date hereof.

ARTICLE IV

"2. SYNDICATE, CASSADY and ACCOUNTANTS hereby irrevocably admit that they, and each of them, have secured from PRUDENTIAL an accounting of the proceeds of all mortgage loans and down payments and the disbursal of same by PRUDENTIAL to the date hereof. SYNDICATE, CASSADY and ACCOUNTANTS do each hereby confirm and approve all of said disbursements by PRUDENTIAL to the date hereof, and do hereby admit, agree and declare that PRUDENTIAL has performed all of its obligations under said Primary Contract and Disbursing Contract and supplement thereto dated the 22nd day of August, 1950, from the respective dates thereof to the date of this Supplemental Agreement."

This agreement irrefutably establishes a complete acceptance and acquittal of the payment theretofore made to Cassady from the project and directly points to the fact that it was Cassady who thereafter failed to perform.

On the issue of waiver and estoppel we cite to the Court the following authorities:

*Restatement of Contracts,* Sec. 300;
*25 Am. Jur. 653;*

*Farrington v. Granite State Fire Ins Co. of Portsmouth, et al.,* Utah, 120 Utah 109, 232 Pac. 2d. 754;

*Larson v. Knight,* 120 Utah 265, 233 Pac. 2d 365;

*Sprague v. Boyle's Brothers Drilling Co.,* 4 Utah 2d 344, 294 Pac. 2d 689.

By the agreement of February 16, 1951, Cassady was given an extension of time until June 1, 1951, to complete the homes which under the agreement of July 19, 1950, should have been finished before January, 1951. It is significant that in this agreement Cassady made no claim for extras and no claim of any damages by reason of any alleged prior breaches by Felt. He did not ask for any construction cost adjustment. Cassady needed more time to finish the houses and Felt was willing to give Cassady additional time. Certainly neither Cassady nor Hartford should be permitted to alter or vary the terms of the supplemental agreement (Ex. Pr. 6) by making claims now which were not deemed sufficiently important to assert at that time.

Indeed the modifying agreement (Ex. Pr. 6) expressly provided:

"ARTICLE IV, PAGE 6

> "This Supplemental Agreement shall be and become effective from the date hereof upon the approval thereof by Pacific Coast Title Insurance Company and Hartford Accident and Indemnity Company and upon becoming effective shall not modify, amend or affect the provisions of the Primary Contract, Construction Contract, Disbursing Contract and supplement thereto dated August 22, 1950, except as herein specifically provided."

Notwithstanding this provision, counsel for Hartford, asserting no breaches of the February 16, 1951, agreement, now desires to rewrite it and include in it claims for self-styled "extras", prior breaches, and immunity from subsequent breaches by Cassady.

It was not claimed nor proved in the evidence by Hartford that there were any breaches of the agreement by Felt which occurred subsequent to this agreement of February 16, 1951, nor did they claim any subsequent breaches by Prudential.

## POINT IV.

FAILURE TO PAY FRANCHISE TAXES AFTER A FOREIGN CORPORATION CEASES TO DO BUSINESS IN UTAH WILL NOT BAR IT FROM THEREAFTER MAINTAINING AN ACTION IN UTAH COURTS.

Hartford contends that Felt's right to maintain this action was forfeited by the provisions of *Section 59-13-61, Utah Code Ann., 1953,* which reads as follows:

> "If a tax computed and levied hereunder (Corporate Franchise Act) is not paid before five o'clock P.M. on the last day of the eleventh month after the date of delinquency, the corporate powers, rights and privileges of the delinquent taxpayer, if it is a domestic corporation, shall be suspended, and if a foreign corporation, it shall thereupon *forfeit its rights to do intrastate business in this state.*" (Emphasis supplied)

Hartford's counsel, by two identical motions, urged their position in this matter in the lower court. One motion was heard before the Honorable Ray Van Cott, Jr. and the other motion was heard at pretrial before the Honorable A. H. Ellett. Both motions were denied.

Counsel for Hartford contend that the words in the statute "forfeit its right to do intrastate business in this state" encompass all corporate rights, including the right to maintain this action. Felt, on the other hand, contends that the quoted words can only be construed to forfeit Felt's rights to do "intrastate business," and cannot be construed to disable Felt from maintaining this lawsuit.

Felt was incorporated in and pursuant to the laws of the State of Nevada and was duly qualified to do business in the State of Utah on March 28, 1950. This qualification antedated all of the contracts and agree-

ments with which we are here concerned. There is no question presented in this record, nor by Hartford, that Felt was not at all times duly and regularly qualified and franchised to participate in business activity within the State of Utah during the construction of Morningside Heights Subdivision; at the time the agreements in evidence were executed; and at the time the sales of the various lots were made. Felt concedes that it did not pay a franchise tax after it ceased to conduct intrastate business in Utah and that its right to do an intrastate business was forfeited on September 22, 1952.

An inspection of *Section 59-13-61, U.C.A., 1953,* sets forth in clear and unambiguous terms what is forfeited by a foreign corporation when it does not pay a franchise tax. The statute specifically provides that only *"the right to do intrastate business"* is forfeited. It does not say, as contended by counsel for Hartford, that its charter is revoked, nor does it say that its existence is ended. The statute merely states that the foreign corporation's *right to do intrastate business in Utah is forfeited.* We thus see that if maintaining a lawsuit is *excluded* from the phrase "intrastate business," Felt still does and at all times herein mentioned did possess the right to maintain this action in the State of Utah.

The words "intrastate business" have been defined quite clearly by the Supreme Court of the State of Utah. In the case of *George R. Barse Live Stock Company v. The Range Valley Cattle Company and J. M. Dart,* 16 Utah 59, 65, the court said:

"... 'to do business,' as defined by Webster, is 'to carry on any particular occupation or employment for a livelihood or gain, as agriculture, trade, mechanic arts, or profession; that which busies or occupies the time, attention, or labor of one.' The statute applies to foreign corporations. The constitution applies to all corporations. In our opinion, the constitution, when reasonably construed, was intended to prohibit corporations from transacting their ordinary corporate business within the state without first complying with its terms, and having one or more places of business, with an authorized resident agent upon whom process could be served in cases of litigation between them and citizens of the state, and to protect citizens of the state against fraud and imposition by insolvent and unrealiable corporations, and place them in a position to be reached by the legal process of the courts of the state, and was not designed or intended to prohibit the doing of one single act of business by such corporation, with no apparent intention to do any other act, or to engage in corporate business. *The bringing of a suit by a foreign corporation to secure its legal rights, under the circumstances shown in this case, is not 'doing business,' within the constitution or laws of this state.*" (Emphasis supplied)

An outstanding review of the authorities was made by the Supreme Court of Utah in the case of *Marchant v. National Reserve Co. of America,* 137 P. 2d 331, 338, and the court therein quoted from the *Barse Live Stock case, supra,* with approval. The court therein stated:

"To summarize, then, the law may be stated to be, from the foregoing decisions, that to be 'doing business' in a state, a corporation must be

> engaged in a continuing course of business, rather than a few isolated transactions, whether those transactions are within the usual scope of that corporation's business or not. There must be at least some permanence about the presence and business transactions of the corporation within the state."

The foregoing cases have not been overruled by this court. It, therefore, seems settled in Utah that a foreign corporation is not doing "intrastate business" in Utah merely by bringing an action in the courts of Utah to enforce its rights.

We have reviewed the cases cited by Hartford in its brief, consisting of *Aalwyn's Law Institute v. Martin,* 159 P. 158 (Cal.); *U. S. F. & G. Co. v. Matthews,* 274 P. 769; *Reed v. Norman,* 302 P. 2d 690; and *Liebson v. Henry,* 356 Mo. 953, 204 S.W. 2d 310. We respectfully submit that none of those cases involved a fact situation similar to the case at bar. Each of those cases concerned *substantially different statutory provisions* and only involved *domestic* corporations.

It follows that the lower court correctly denied Hartford's motion each time it was made.

## CONCLUSION

In its brief Hartford has avoided the well-established rule applicable to appellate review and has argued against matters determined by the lower court which are fully substantiated by the evidence. Felt met its burden of proof in the lower court, and the record supports the

findings and conclusions that material and substantial breaches by Cassady were the proximate cause of the damages sustained by all the plaintiffs, including Felt. Hartford, in consideration of a substantial premium, guaranteed the performance by Cassady. Hartford has conceded that Cassady altogether failed to perform. He did not complete one house of the one hundred. Funds that were payable to Felt on the miscellaneous account and on the profit account were used to complete the project. Hartford in justice and in all good conscience should have performed on its bond instead of joining Cassady in default.

For reasons set forth in this brief, it is further clear that the lower court erred in excluding the portion of the miscellaneous account due Felt in computing its judgment; and the amount of $14,761.80 plus interest from the date of default should be added to the judgment.

Respectfully submitted,

WOODROW D. WHITE and
C. PRESTON ALLEN,
*Attorneys for Appellant,*
*Felt Syndicate, Inc.*