

1953

Vern B. Millard v. Jesse H. Parry et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

DEC - 1 1958

VERN B. MILLARD,

Plaintiff and Appellant, Clerk, Supreme Court, Utah

— vs. —

JESSE H. PARRY and ELSIE H.
PARRY, his wife,

Defendants and Respondents,

STRAND ELECTRIC SERVICE
COMPANY, a corporation, and
OTTO DREWS,

Defendants.

No. 8026

Brief of Respondents

W. D. BEATIE

*Attorney for Defendants and
Respondents Parry.*

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NO CASES OR AUTHORITIES CITED

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— vs. —

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Brief of Respondents

STATEMENT OF FACTS

Defendant, Jesse H. Parry was the owner of adjacent premises at 160 and 162 South 13th East Street (R. 606) and desired to construct an apartment at the rear of 160 South 13th East. The plaintiff, Vern B. Millard, a general contractor, called defendant Parry at his home about this construction and they met by appointment at the premises about the first week of November, 1950. Several days later defendant observed plaintiff and another person at the site and plaintiff introduced Mr. Leroy W. Johnson an architect to defendant. Johnson

suggested drawing a sketch for the premises which he did (Exs. 18, 19 and 20) (R. 608). These sketches were delivered to defendant about the first part of December, 1950 and Johnson was employed as the architect. A few days later, Johnson delivered three white sketches. (Ex. 35). At one of the early discussions plaintiff suggested building an additional six units on the front of 160 South 13th East to match up with the new building. (R. 609). On January 8, 1951 defendant Parry notified Johnson that he could not make financial arrangements to build the additional six units on the front of the existing structure. (R. 764) About January 15, 1951 defendant had submitted to him a set of plans for the new 11 unit structure and the only change suggested in the plans was an entrance to the boiler room on the east side of the basement (Ex. P-5) which change was made and the plans returned to defendant. At the same time defendant was given a set of specifications, (Ex. 36) which plans (Ex. P-5) and specifications (Ex. 36) defendant Parry has had in his possession ever since that time.

On the 29th day of January, 1951 plaintiff and defendant entered into a written contract for \$82,000.00 for the erection of an eleven unit structure. (Exs. P-6 and D-7) (R. 20) These exhibits specified 25 sheets of drawings and specification sheets numbered through 57. Article 3 of the specifications detailed certain allowances for kitchen cabinets, ranges, refrigerators and lighting fixtures. (Ex. P-2), plaintiff's copy of plans is identical with defendants' copy of plans (Ex. P-5) excepting page 20 of plaintiff's plans which was taken out by plaintiff

to be delivered to a sub-contractor. Plaintiff's specifications (Ex. P-3) and defendants' specifications (Ex. D-36) are identical.

Prior to the signing of the contract discussion was had as to the type of windows which were known as Pella units and provided for in the specifications (Exs. P-3 and D-36) at page 19 which provided:

“windows; shall be Pella Units as called for on plans to be installed according to the manufacturers direction as part of the carpentry contract.”

The specifications (Ex. P-3) at page 34, under the heading “utilities” provides:

“provide all necessary material and labor for the installation of a 4 inch diameter soil pipe sewer from the building and connecting to the city sewer as shown on the plot plan.”

Johnson testified that it was anticipated that there would be a complete system of waste and vent piping and connected to the sewer system of Salt Lake City (R. 357) and that there would be a water system connecting the 11 unit apartment to the Salt Lake City water system. (R. 358)

At a trial of Johnson vs. Parry in December, 1951, the exhibits in that case No. 94041 were withdrawn and reintroduced in this action as Exhibits P-4, 6, 17, 18, 19, 20, 21 and 36. Exhibit P-4 consists of 4 white sheets and 1 yellow sheet bearing various dates in January, 1951. The 4th white sheet of Ex. P-4 shows itemized computa-

tions of Johnson of 150 feet of sewer pipe at \$2.20 per foot and 150 feet of water service at 35c per foot, while the yellow sheet of Ex. P-4 includes a statement "this does not include sewer or water meter service." Exhibit P-4 was never seen by defendant until December, 1951 in case No. 94041 and was obtained by Johnson and presented to plaintiff for his use in bidding.

About January 1, 1951 defendants Parry, at the request of Johnson, made selection of colors and sizes in plumbing fixtures (R. 786). About January 15, 1951, Johnson and Mrs. Parry went to the Flint Distributing Company to look at metal cabinets, refrigerators and stoves. (R. 787) The plumbing fixtures selected were specified in the specifications at page 35 and an allowance for kitchen cabinets, ranges and refrigerators selected was made within article 3. (Exs. P-6 and 7.)

On February 3, 1951 plaintiff filed a set of specifications (Ex. D-37) and plans, (Ex. D-38) and an application for a permit (Ex. D-39) with the Salt Lake City Building Engineer, and on February 5, 1951 a building permit to plaintiff was issued upon the aforesaid filing. The exhibits filed for the permit are identical with plans and specifications in the possession of both plaintiff and defendant.

Shortly after plaintiff commenced work, the Pella Window units were delivered to the site and stored in the garages on the premises, and plaintiff obtained Exhibit D-15 which is a detail of the Pella unit casement window, which exhibit was posted in the work office of plaintiff on the construction site.

The first difficulty arose at the time the floor joists on the first floor were in place in April when it was discovered that the floor joists on the east side of the apartment ran in the wrong direction and that the metal air ducts could not be hidden in the floor joists which required that the ceiling be furred down which defendant objected to both to Johnson and plaintiff and this work was halted for a two-day period, but plaintiff's workmen were placed on other work at the site.

About July 19, 1951, Johnson, the architect, terminated his services with the defendant at which time plaintiff and defendant discussed completion of the structure. Defendant Parry testified as follows:

“Q. What was said?

A. Mr. Johnson had terminated his services and I talked, when I talked to Mr. Millard about it and he said he was going to make the building go ahead, he wasn't going to let it stand still, he was going to continue to build, that I wouldn't have nothing but a shell. I talked to Mr. Millard about it and he said that we could work together and get this building completed, which we did.

Q. Was any financial arrangements made with reference to that conversation?

A. Yes sir.

Q. As to how Mr. Millard would be paid?

A. Yes sir.

Q. All right. Just tell us what the conversation was? (R. 623)

A. At that time I had paid Mr. Millard up to the contract price where we was withholding the

ten percent. I told Mr. Millard if he would continue on with me I would start paying him the ten percent that we was withholding from the contract price. (R. 624)

At the signing of the contract, January 29, 1951, it was agreed between plaintiff and defendant that any extras or additions requested by defendant were to be charged upon a cost plus 10% basis.

Subsequent to architect Johnson leaving the project and on completion of the interior rough finish and insertion of the window units it was discovered by defendant that the outside brick walls, shown on the plans to be 13 inches, had been reduced to 10 inches on the main floor and 8 inches on the top floor. Defendant complained to plaintiff that he had not followed the plans and specifications of the brick walls. Plaintiff claimed that he bid upon the structure upon that basis of standard walls on the instruction of the architect without defendant being advised of any such change and which construction resulted in a half window sill on the main floor and no window sill on the top floor.

Construction in the wash and locker room required plastering of that room which was left out of the plans and which Johnson had agreed was his error and for which he would be liable, and defendant ordered the work done. (Ex. 30.)

In placing the cabinets in the north basement apartment it was discovered that they extended over the end of the wall about one foot due to an error of computation of the architect. Defendant ordered the wall extended

to accommodate the cabinets as an extra and this change was made in three of the apartments. Additional cabinets in the west three apartments were ordered and billed as extras.

The refrigerators, ranges and cabinets selected by defendant were delivered to plaintiff who stored them in his personal garage awaiting installation. Five of the refrigerator doors opened the wrong way and two of these five refrigerators had to be exchanged for smaller ones as the refrigerator space, when constructed, was not large enough to accommodate the refrigerator previously chosen.

Changes were made on the bedroom closets from single doors to full length sliding doors and billed and admitted as extras. Changes were made in the three west apartments in planter box partitions from corrugated glass to louvered corrugated glass, which changes were requested by defendant as extras.

Defendant selected color and style of linoleum including certain striping. The installation of the linoleum, however, without request of defendant was coved at the edges instead of using base board and round lumber.

During the entire construction, additional work on the premises at 160 South 13th East and 162 South 13th East were made by plaintiff which were billed as extras on a basis of cost plus 10%.

During the employment of the architect until about July 19, 1951, billings for the work as it progressed were made in accordance with the terms of the contract by

the architect for the account of plaintiff. The draws on contract commenced March 2, 1951 and continued through draw No. 6 dated July 5, 1951. Billings were then made by plaintiff direct to defendant on August 1, 1951, September 5, 1951 and November 1, 1951. Extras were billed direct by plaintiff to defendant commencing August 30, 1951. All of the above items being shown in Exhibit P-13 as follows:

Draw No.	Draw Date	Amount of Draw	Payment To	Payment Date	Payment Amount
		\$ 4,285.92	Johnson Supply Co.	2-19-51	\$ 4,285.92
2	3-2-51	\$ 6,589.06	Vern B. Millard	3-5-51	\$ 6,589.06
3	4-2-51	\$17,221.12	Vern Millard	4-5-51	\$17,221.12
4	5-1-51	\$ 9,161.39	Vern B. Millard	5-3-51	\$ 9,161.39
5	6-1-51	\$12,704.17	Vern B. Millard	6-5-51	\$12,704.17
6	7-5-51	\$14,934.77	Vern B. Millard	7-5-51	\$14,934.77
6	8-1-51	\$ 7,727.88	Vern B. Millard	8-3-51	\$ 7,727.88
7	9-5-51	\$ 6,635.00	Vern B. Millard	(9- 6-51	\$ 4,500.00
				(10-10-51	\$ 2,135.00
Total					\$79,259.31

Billing November 1, 1951 as follows:

Contract price	\$82,000.00
Paid to date	76,785.43
Balance on contract	\$ 5,214.57
Paid on extras	\$942.96

PAYMENT TO MILLARD — EXTRAS

Sept. 12, 1951 Vern B. Millard — extra \$942.86

PAYMENTS TO MILLARD AND SUBCONTRACTOR

Nov. 8, 1951	Vern B. Millard & Williams Building Supply	\$1,852.88
Nov. 8, 1951	Vern B. Millard & Wilson Tile Co.	1,500.00
Nov. 8, 1951	Vern B. Millard & Ben E. Berger	1,030.70
Nov. 8, 1951	Vern B. Millard & Ernest E. Hank	470.00
Nov. 28, 1951	Ludlow Plumbing & Vern Millard	1,157.17
Jan. 11, 1952	Johnson Supply Co.	500.00
Jan. 31, 1952	Johnson Supply Co.	426.89
		<hr/> \$6,937.64

RECAPITULATION

Paid to Millard	\$79,259.31
Paid to Millard & Subcontractors	6,937.64
Paid to Millard — extras	942.86
	<hr/> \$87,139.81

BILLINGS FOR EXTRAS

Billing No.	Date	Items Billed	Amt. of Billing
1	8-30-51	1-8 Inc.	\$1,524.39
2	10-26-51	9-22 Inc.	2,902.34
3	10-30-51	23-35 Inc.	3,168.98
4	11- 1-51	36	386.72
5	11- 5-51	37 and 38	717.16
6	11-13-51	39 and 40	288.23
			<hr/> \$8,987.82

Of the first 40 items of extras last billing November 13, 1952, 11 were disputed in the sum of \$3435.14 as being items included in the contract, and the defendant admitted the balance of the items of extras in the sum of \$4381.87.

As shown in the prior schedule, defendant Parry paid to plaintiff Millard and sub-contractors between November 8, 1951 and January 31, 1952, the sum of \$6,937.64 and in addition thereto claimed a credit of \$1215.32 which he had expended for connecting the sewer to the city system.

Thus the contention of defendant Parry as to the status of payment on the contract as of February 1, 1952 showed as follows:

Contract price	\$82,000.00
Admitted extras in items 1 to 40	4,381.87
	<hr/>
	\$86,381.87
Payment to Millard	\$79,259.31
Paid to Millard and	
Sub-contractors	6,937.64
Paid to Millard on extras	942.86
Claimed credit for sewer	
connection	1,215.32
	<hr/>
	\$88,355.13

RECAPITULATION

Contract plus extras	\$86,381.87
Payments and credit	88,355.13
	<hr/>

Claimed overpayment to Feb. 1, 1952 \$ 1,973.26

Items 41 to 60 inclusive for extras in the sum of \$13,735.79 (Ex. P-14) were introduced and claimed in March, 1953 during trial of this action. Of items 41 to 60, certain items were admitted by defendant Parry and others questioned as in the previous billings as being included within the contract price.

About October 15, 1951 defendants Parry went to the office of plaintiff Vern B. Millard and the following conversation was had:

“Q. Why did you go to the office at that particular time?

A. Well, there were so many demands on the job for payments of sub-contractors that Mr. Millard had not been paying his draws on us, we would ask for a lien waivers and he promised them and promised them and wouldn't give them to us on all this money and we gave him, so we demanded that we go to his office and settle this and find out who he owed, what it was, if we could settle it in a nice manner. And Mr. Anderson couldn't come to the terms of what we had paid. (R. 628)

* * * * *

Q. What was said?

A. Well, there was many things said.

Q. Let's have them.

A. Well, we wanted lien waivers for these sub-contractors we had paid, advanced Mr. Millard this money on, and he couldn't produce them for us and he says, “by the time I get through with you I will file so many liens on you that your head will swim.”

THE COURT: He said what?

A. I'll file so many liens on you that your head will swim.

THE COURT: Who said that?

A. Mr. Millard, sir, and at that time it was getting so my wife and I, we just decided we couldn't do anything with Mr. Millard on this billing. I said if he could furnish me a list of people that hadn't been paid we would try and pay them, that we would try and settle this in the best manner we possibly could ourselves and walked out of his office.

Q. Now, in accordance with, or after that conversation, did you then go to certain of the subcontractors, or those that were making demands upon you to verify the amounts that they were

(R. 629) yet to be paid?

A. Yes sir. (R. 630)

Q. Now after the conversation you had at Mr. Millard's office, I will hand you what is marked for identification as Exhibit P-8 and will ask you just where you saw that?

A. Mr. Millard handed this to me at the property site.

Q. And the notations which you have made are those your notations?

A. Yes sir. (R. 631)

Q. I will ask you if at any time you requested an itemized statement of all costs on this job?

A. No sir.

Q. I will hand you now what is Exhibit P-9 and ask you where you first got that?

A. It was sent by the mail to my home. (R. 632)

This Exhibit P-9, dated December 28, 1951, claimed that there was a balance due of \$24,752.91 upon a cost plus 10% contract.

Plaintiff filed his notice of lien on the above amount on January 8, 1952 and commenced this action July 14, 1952 in which the defendants were the Parrys, Strand Electric Service Company and Otto Drews who all filed answers and cross complaints. Sub-contractor Balmforth filed a separate suit based upon a lien which was case No. 96104 and which was consolidated with this action for trial.

Plaintiff admitted at trial that the amount of the liens and sub-contractor claims aforesaid were included within his amount then claimed due from Parry. The basis of the suit against Parrys by the sub-contractors was for his failure to require plaintiff to file a Statutory Performance Bond.

During the course of trial it was stipulated between all the parties that upon determination by the Court of various amounts due and owing lien claimants, that upon the payment of said determined amounts, credit would be given in the judgment to be entered in this action.

On April 10, 1953 plaintiff and defendant entered into a stipulation that the entire sum found due the lien claimants Strand Electric Service Company, John Lee Floor Coverings and Otto Drews in the aggregate sum of \$4,338.47 could be paid by the defendant Parry who would be entitled to a credit in the action and that upon payment of the claims the various actions and claims of the lien claimants would be dismissed.

The Court determined that the defendant was liable in the total sum of \$92,658.30 which included items of extras Nos. 41 to 60 introduced at time of trial and that credit for payments made on account and a credit for sewer and brick together with the payment of the three lien claimants was the sum of \$93,093.60 which made an overpayment on the part of defendant in the sum of \$435.30 in this action and for which judgment against plaintiff was entered.

ARGUMENT

POINT I.

THE JUDGMENT AND DECREE CONTAINS CONTRADICTIONARY PROVISIONS, AND DISMISSAL OF THE COUNTERCLAIM PRECLUDED ENTRY OF A JUDGMENT AGAINST THE PLAINTIFF.

This action proceeded to trial in consolidation with case No. 96104 upon the theory that stipulation be made between all of counsel as to the claims of defendants Strand Electric Service Company, Otto Drews and John Lee Floor Covering in the consolidated case and that the amount of their claims would be admitted and that it would then be determined by the Court what part, if any of said claims, was chargeable to the plaintiff or the defendants.

This position is evidenced by statement in the record by defendant's counsel (R. 96):

"I am sure that my client feels that we do not wish any judgment going against the property and we want the liens released, so I believe satis-

factory judgment can be made which will obviate the necessity of rendering any findings as to the matter. I don't want a judgment entered on this matter until the entire matter is completed."

After the trial of this matter and on the 10th day of April, 1953 counsel for parties involved in these actions stipulated (R. 55):

"5. That as to the particular portions of said claims so paid with respect to which it shall finally be adjudged that plaintiff is liable, said defendants Jesse H. Parry and wife shall be entitled to credit in the above entitled cause as of the date payment of claims is made (which credit shall be in addition to the payment heretofore made to plaintiff and/or to materialmen or subcontractors).

* * * * *

7. That upon payment of said claims the actions and counterclaims of said claimants are to be dismissed with prejudice."

All of the above claims are included in the billing of plaintiff to defendants (Ex. P-9) bearing date of December 28, 1951. No further claims of Millard were made upon defendant Parry until trial when Exhibit P-14 in an additional sum of \$13,735.79 was made and a further claim made during the course of the trial in the amount of \$3,212.00 (R. 498):

"Q. Are you claiming that the item of \$3,212.00 is an additional charge by reason of not proceeding with the construction?

THE COURT: Which item?

Q. It isn't shown on here. It isn't shown as an extra. It is an item of damage that would come by failure to go ahead with this after getting him to go ahead with his figure.

A. I felt that I was damaged that much.

THE COURT: How much is it?

A. Thirty-Two Hundred Dollars and Twelve—I mean \$3,212.00."

Thus, the additional claims were made by plaintiff against Parry during trial and would have to be considered as a counter-claim to the counter-claim which the defendant had filed against plaintiff.

Therefore an examination of the record does disclose that the plaintiff made counter claims against the counter claim of the defendant Parry and the statement in the judgment of the Court is not in error.

Based upon the aforesaid statements and stipulations the Court tried this action item by item allowing certain credits to defendant Parry for payments as being items included in the contract of January 29, 1951 and allowing plaintiff other items for extras based upon the \$82,000.00 contract such that after defendant Parry paid the lien claimants \$4,338.47 there was an excess of payments credited to Parry in the sum of \$435.30 for which he was entitled to a judgment under the terms of the stipulation of April 10, 1952. (R. 54-55.)

Thus the provisions of the judgment are not contradictory nor void.

POINT II.

THE ORDER REQUIRING PLAINTIFF TO RELEASE HIS LIEN WAS CONTRARY TO LAW.

The Court in its Judgment determined that the \$82,000.00 contract dated January 29, 1951 between plaintiff and defendant was in effect and was changed only by an agreement between plaintiff and defendant on the termination of the services of the architect that the structure would be completed with plaintiff billing defendant, after July 19, 1951, for monthly balance and including the 10% which had previously been withheld under the terms of the contract. Exhibit 13 which is all of the billings and payments discloses that commencing August 1, 1951 and subsequent billings on September 5 and November 1, 1951 were billed upon the basis of complete billing which included the 10% which had been previously withheld under architect's draws.

Thus, under the contention of defendant that as of February 1, 1952 there was a claimed overpayment of \$1973.26 there would be no justification for the plaintiff to have filed a lien claiming \$24,752.91 (Ex. P-9) and therefore, there being no justification for the filing of the lien and as an incident of the judgment it was proper that the lien so filed should be released.

The plaintiff was not placed in any unfair predicament by reason of the Court ordering the release of the lien as he made no objection to that portion of the judgment and allowed the Court to enter the judgment on April 23, 1953.

It seems elemental that if the plaintiff filed an improper lien it would of necessity follow that a judgment sustaining the position of the defendant that the lien was improper and it should be ordered released in the judgment.

POINT III.

THE TRIAL COURT UNLAWFULLY PENALIZED PLAINTIFF FOR THE DEFAULTS OF DEFENDANTS PARRY, BY DENYING PLAINTIFF INTEREST ON SUMS FOUND TO BE DUE AND OWING FROM SAID DEFENDANTS, AND BY ALLOWING SAID DEFENDANTS INTEREST PAID TO THIRD PARTY OBLIGEES AFTER TRIAL.

Argument of appellant that there was an unpaid balance of \$24,752.91 is based upon a cost plus 10% basis contended by the appellant.

Counsel for appellant at page 35 of his brief states:

“The trial Court found by implication that only \$3,803.17 was still due and owing as of the time of trial. Said indebtedness found by the Court to be owing from said defendants at the time of trial was not paid until after trial.”

This position is untenable for the reason, as before stated, that during progress of trial, Exhibit P-14 claimed \$13,735.79 additional as extras, items No. 41 to 60 inclusive. Of said 20 items defendant admitted 9 and denied the balance. Including these items admitted, the Court found defendant chargeable with the sum of \$3,781.50 (items 41 to 60 inclusive in Schedule R. 72-73)

which are items never presented to defendant as extras until time of this trial. These items are then included in the amount of \$92,658.30 found due on contract price plus extras. (R. 74.) Not having been billed for the items 41-60 inclusive until progress of trial, defendant Parry should not be penalized if it was an error of judgment of plaintiff not to pay his sub-contractors for work which they had performed and about which the three lien claimants participated in this trial.

This sum of \$3781.50 was thus discharged as per stipulation (R. 54-55) by Parry paying the three lien claimants during trial the sum of \$4338.47 which created an overpayment by Parry of \$435.30 for which he was given judgment by the Court.

Thus the findings of fact and conclusions of law are substantiated by the aforesaid facts.

Defendant found himself in the position of having demands made upon him by various sub-contractors around October 1, 1951 for payments of accounts which plaintiff had failed to pay, with the result that defendant went to plaintiff's office about October 15, 1951 for the purpose of confirming payments which he had made on account of any balances which might be due to sub-contractors who were making demands upon defendant for payment. As a result of this conference defendant received on the site Exhibit P-8 which was a statement of total costs of the construction and from which statement he had to determine unpaid balances to various sub-contractors where payments were justly due and

plaintiff had not paid, in order to prevent filing of liens of certain sub-contractors. It is interesting to note that the item of the Johnson Building Supply Company on Exhibit P-8 is the sum of \$21,219.20 from which it was determined by defendant Parry that there was a balance due said company of \$926.89 which item was paid by two checks dated January 11, 1952 and January 31, 1952. These payments prevented the filing of a lien by said Johnson Building Supply Company as was likewise the case of payments made to Williams Building Supply, Wilson Tile Company, Ben E. Berger, Ernest E. Hank and Ludlow Plumbing Company between November 8 and November 28, 1951 in an aggregate sum of \$6,010.75. The statement attached to letter of attorney for appellant to defendant (Ex. P-9) discloses that the amount of the same Johnson Building Supply Company was the sum of \$15,162.02 such that the subsequent billing (Ex. P-9) of the same account is \$5,057.18 less than the previous billing of the same account on October 30, 1951 (Ex. P-8).

Exhibit P-9 was the first knowledge that defendant had that this construction was being billed upon a cost plus 10% basis and was over 1½ months after the last work was performed upon the job.

The position taken by the trial Court is most aptly presented by a statement made by the Court at the conclusion of the trial and during argument of counsel (R. 922):

“Here is another thing that is very persuasive in this matter. Mr. Millard’s billing, from his own

billing, ran into November, which was he was proceeding under this contract with extras. Now, that is a very persuasive thing in a dispute like this, where it is left to believe one witness against the other.

You have the accounts of Mr. Anderson and Mr. Millard's billing of these people ran into November, and after they have completed this job, which under the contract showed balances under the contract and for extras. That is just one item that is very persuasive. Then, of course, I will say this, that in these plans and these specifications, these things that are in dispute between you, these points are provided for, and to avoid the provision of those plans and specifications you have got to create a side verbal understanding here, and in the light of the fact that there is a strong dispute between these people that such a thing occurred, and as I say, going back to this, in the light that you have Mr. Millard billing these people up to and after the contract is done, on a contract and extra basis, now Mr. Reimann, if you were in my position you just could not simply say, in the light of that, you would disregard that."

Thus, it seems elemental that all extras due lien claimants having been charged against defendant, he would be entitled to full credit for all payments made lien claimants.

Counsel refers on page 41 of his brief to the percentages of costs charged by lien claimants. The sum of \$42.75 was charged against defendant in the judgment found, thus he again should be entitled to credit for amount paid to lien claimants.

POINT IV.

IT WAS ERROR TO ALLOW THE DEFAULTING DEBTORS ATTORNEY FEES AND COSTS, AND ALSO ERROR TO DENY THE PLAINTIFF ATTORNEY FEES AND COSTS.

At page 42 of appellant's brief counsel states:

“Even the trial Court found that there was a principal amount of \$3,803.17 still due and owing after allowing every possible credit.”

Counsel for appellant's computation of the amount found due at trial differs from this counsel who computes the figure at \$3,781.50. This figure as stated in the previous point consists of items numbered 41 to 60 (Ex. P-14) which are extras claimed during trial aggregating in all \$13,735.79 of which the Court allowed the aforesaid figure of \$3781.50. None of these items of extras totaling \$3781.50 were ever presented to defendant until the 3rd day of trial of this action.

Appellant's counsel refers to Exhibit P-9 dated December 28, 1951 which defendant Parry testified he received about January 4, 1952 and was the first notice he had ever received that he owed a purported balance of \$24,752.91 by reason of the construction contract being a cost plus 10% contract.

Counsel for appellant gave great latitude of discretion to defendant on this \$24,752.91 claim by filing notice of lien in the office of the County Recorder of Salt Lake County on the claim on January 8, 1952 — four days

after defendant had received counsel's letter with statement attached.

It is true enough that defendant could have paid plaintiff \$24,752.91 as demanded and then have turned around and sued for the determination of credits which plaintiff would not allow, but defendant deemed it not advisable on advice of counsel.

Counsel for appellant seems to forget that this action which he commenced was based upon the foreclosure of a lien on a contract claimed to be on a cost plus 10% basis and that when the trial Court determined appellant's contention was not correct, his suit would fail and the defendant would be entitled to his costs.

POINT V.

PLAINTIFF REDUCED HIS BID TO \$82,000.00 IN RELIANCE ON THE DIRECTIONS OF THE ARCHITECT FOR OMISSION OF CERTAIN ITEMS, AND ALSO ON THE PROMISE OF ARCHITECT SUPERVISION AND NON-INTERFERENCE BY OWNERS, AND ON THE REPRESENTATION THAT ADDITIONAL CONSTRUCTION WAS BEING AWARDED TO PLAINTIFF, SO THAT PLAINTIFF WAS NOT BOUND WHEN DEFENDANTS DISREGARDED THE CONTRACT AND DEPRIVED THE PLAINTIFF OF A SUBSTANTIAL PORTION OF CONSIDERATION FOR WHICH HE BARGAINED.

The first problem raised under this point is argued by counsel for appellant with utter disregard to the

testimony in this action as to the acquisition of materials on the part of defendant.

The testimony shows that the Pella window units were ordered and plaintiff was so advised at all times and plaintiff had ample knowledge of this fact within the specifications (Ex. P-3) page 19 where the specifications state:

“Windows; shall be Pella units as called for on plans to be installed according to the manufacturer’s direction as a part of the carpentry contract.”

Plaintiff was advised as to the plumbing material which is set out in the specifications (Ex. P-3, page 35).

It is interesting to note that the 4th page of Exhibit P-4 includes figures admitted by Johnson himself to include computations of cost for sewer and water service in the sum of \$5667.00 which is the figure which plaintiff used in his bidding on the job. This exhibit was at all times in the possession of the plaintiff until it became an exhibit in December, 1951 in Case No. 94041 and which this defendant withdrew in order to introduce in this action.

Plaintiff’s witness Johnson who was the architect, admitted upon cross examination that with reference to Exhibit P-4 he had in mind sewer pipe and water pipe to be included in the contract (R. 372, 374). This witness further admitted that the specifications used on this job (Ex. P-3) provided for water service and connecting a sewer system. (R. 357-358). Further, witness admitted

that he never mentioned to defendant the change in thickness of outside walls from 13 inch walls showed in the plans to walls of 9 inch in thickness including plaster, on the top floor. (R. 369). This change was stated by the witness not to be material even though it left the upper floor of the structure without any window sills. Witness further stated that the last two pages of the plans (Ex. P-2) plaintiff's copy, (Ex. P-5) defendants' copy and (Ex. D-38) Salt Lake City Building Engineer's copy were drawn the last part of February, 1952, (R. 386) after the signing of the contract but Exhibit D-38, discloses that the last two sheets which are identical with defendants' copy (Ex. P-5) were part of the plans filed on February 3, 1952 for the purpose of obtaining a building permit. This witness further testified that \$82,000.00 was a just and reasonable fee for the construction of these 11 units (R. 387).

Plaintiff being a general contractor of great experience could very early in the progress of construction have terminated the contract while there was still architectural supervision if the interference of the defendants Parry was causing undue loss of time and overhead. Plaintiff further could have refused to have continued construction about July 19, 1951 when the services of the architect were terminated and the best answer to the problem is incorporated within the physical properties of Exhibit P-13 showing a billing on a contract and extra basis after completion of the work and payments having been made by defendant under those billings.

Defendants Parry visited the site on their way to

work in the morning for about 15 minutes and then returned to the site on their way home from work and after plaintiff's workmen had left the job so that there could not have been a wholesale loss of time due to owner interference.

POINT VI.

EVEN IF THE CONTRACT WERE NOT VOIDABLE, IT COULD NOT BE CONSTRUED TO REQUIRE PLAINTIFF TO FURNISH ITEMS IN EXCESS OF THOSE ON WHICH THE ARCHITECT AS AGENT OF OWNERS INSTRUCTED PLAINTIFF TO BASE HIS BID, AND PLAINTIFF IS THEREFORE ENTITLED TO RECOVER ADDITIONAL SUMS.

The specifications for this job heretofore referred to specifically required the construction and connection to the Salt Lake City sewer and upon refusal of plaintiff to connect to the sewer, defendant was required to have this work done which cost \$1215.32. (Ex. 42-43.) The master plot plan repeatedly referred to in appellant's brief was never seen by defendant until the trial of Johnson vs. Parry in December, 1951, which is the exhibit introduced by Johnson himself and is one of the exhibits withdrawn from that case for use in this action. This master plot plan drawn in April, 1951 indicated running the sewer directly to the east for connection with the sewer at 13th East which was impossible for when Salt Lake City Building Engineer staked out the location for the sewer it had to be cut diagonally across the front of

the premises at 160 So. 13th East in order to have the sewer flow by gravity, there being a 16 foot difference in height between where the master plot plan showed a connection and where it actually had to be connected.

POINT VII.

THE PURPORTED AGREEMENT WHICH THE COURT FOUND WAS MADE ON JULY 19, 1951, IS CONTRARY TO THE EVIDENCE AND WOULD DEPRIVE PLAINTIFF OF THOUSANDS OF DOLLARS WITHOUT CONSIDERATION.

As to this point plaintiff contends that if the contract of January 29, 1951 were not abrogated prior to the termination of the services of the architect about July 19, 1951, the contract was then abrogated for failure of defendant to employ another architect.

Plaintiff, at the termination of the services of the architect, had a legal right to terminate the contract at that point if he so desired. Instead of terminating the contract, every intendment of the evidence, particularly Exhibit P-13 billings and payments, shows that after Johnson left as architect the plaintiff billed Parry for the full amount expended during each billing period which included the 10% being withheld until completion under the terms of the contract and these billings were paid by defendant.

At page 77 of appellant's brief the statement is made:

"the billings by Mr. Millard were on the basis

of cost plus 10% from and after August 1, 1951
(See Ex. P-13)''

This exhibit shows the contract billings direct by plaintiff to defendant under date of August 1, 1951, September 5, 1951 and the last billing dated November 1, 1951 is as follows:

“Contract price	\$82,000.00
Paid to date	76,785.43
	<hr/>
Balance on contract	5,214.57
Paid on extras	\$942.96

At the date of this last billing there had been only one billing of extras, of eight items dated August 30, 1951 on which the last contract billing indicated a payment of \$942.96, which is the payment for extras not disputed. The disputed items being questioned as being items included within the contract. Subsequent billings on extras continued to November 13, 1951 through item 40 showing a total on the last billing of \$7,473.43.

Plaintiff himself was very uncertain as to when his supposed contract of cost plus 10% began as is shown by his testimony:

“Q. Did you proceed under the contract of January 29, 1951?

A. Yes.

Q. Now how long did you continue under the terms of that contract?

A. Well, until along in the summer when I was picking up extras that went along that kept getting more numerous and more numerous and then

I felt that the contract was not in effect any more.

Q. And can you give me any ascertainment by month and date approximately when you considered that the job was changed from the contract of January 29th?

A. About July 1st. (R. 541)

* * * * *

Q. Now I will ask you the question again. Did you consider this structure to be upon a cost plus 10% basis from the beginning of the work which was done at 160 So. 13th East?

A. I will state that I was keeping extra costs in anticipation of using it as cost plus if they became and continued irregular. (R. 542)

* * * * *

Q. Now you never made any statement to Mr. Johnson from January 29, 1951 until July 19, 1951 with reference to the fact that it was on a cost plus 10% contract, did you?

A. No, but I was keeping the costs as they went along." (R. 543)

The theory of a cost plus 10% contract was denied by Mr. Parry:

"Q. After January 29, 1951 did you ever enter into any contract with Mr. Vern B. Millard the plaintiff herein for a cost plus 10% contract for the erection of this 11 unit building?

A. At no time, I did not, sir. (R. 622)

It is the conclusion of the writer of this brief that Exhibit P-13 clearly discloses the fact that appellant Millard recognized the contract of January 29, 1951 even after leaving the premises on November 8, 1951 by billing extras as late as November 13, 1951.

POINT VIII.

FAILURE OF THE TRIAL COURT TO ALLOW EVEN AS EXTRAS, THOUSANDS OF DOLLARS OF COSTS INCURRED BY PLAINTIFF THROUGH THE CONDUCT OF DEFENDANTS AND THEIR ARCHITECT, AMOUNTS TO UNJUST ENRICHMENT OF SAID DEFENDANTS.

The item of \$3,212.00 mentioned on page 80 of appellant's brief and all of the items set forth in page 81 of their brief are items which, as before stated, were introduced for the first time during the course of the trial, and the Court took the position that, having jurisdiction of the matter, he would consider those items, some of which were admitted as extras on the part of the defendant and others contested. It is here to be noted that the items set forth on page 81 of the brief were figures which were computed from memory during course of trial based upon the memory of Mr. Merrill, appellant's foreman in conference with appellant and his bookkeeper, Mr. Anderson, with no other evidentiary factor other than the estimation of Mr. Merrill. It is further to be noted that all items of billing for extras (Ex. P-13) were at cost plus 10% and in the final determination, appellant was given those items to which he was entitled on a basis of his cost plus 10% plus an additional 10% as a contractor's fee, the first 10% being considered overhead and therefore part of the cost. Thus appellant was given a sum of \$389.28 additional on items 1 to 40 of extras billed up to November 13, 1951 and \$267.39 on items 41 to 60 which were extras intro-

duced at the time of trial, making an aggregate sum of \$656.67 the court allowed the appellant over the amount of his billings.

It has repeatedly been admitted that specific changes were ordered by defendant for which he was billed as extras. It is to be supposed that in discussing these changes some time element would be consumed with Mr. Millard or his foreman and which specific extras were billed and paid for.

At page 82 of his brief appellant states:

“the allowance of \$363.00 for item 60 on exhibit P-14 shows that the trial Judge recognized the fact that the owners did interfere and did make construction more costly.”

This item was billed at \$2,420.00 for additional labor costs due to overtime, delays by changes not shown as extras and interference by owners. Mr. Merrill, foreman for plaintiff, testified on this item that \$300.00 was reasonable for overtime and the Court allowed that figure as his finding.

CONCLUSION

It is respectfully submitted that plaintiff in this action never did prove a cost plus 10% contract.

The physical evidence discloses that plaintiff and defendant continued on the construction after the termination of the architect's services with owner supervision. Billings at all times during architectural supervision were made monthly on the contract basis but withholding 10% for completion. Billings during owner

supervision were made on a contract basis but included the 10% withheld under architect's supervision and all billings for extras were made directly by plaintiff to defendant on a cost plus basis even to date subsequent to completion of the work. The last billing on the contract was dated November 1, 1951 and was as follows:

Contract price	\$82,000.00
Paid to date	76,785.43
<hr/>	
Balance on contract	\$ 5,214.57
Paid on extras	\$942.96

The first time defendant was advised that plaintiff was claiming this to be a cost plus job was when he was advised by counsel for plaintiff which letter and exhibit attached was received about January 4, 1952. Plaintiff then filed his notice of lien of January 8th claiming \$24,752.91 still due and owing.

The first question involved in this suit is whether or not the contract of January 29, 1951 was abrogated. The trial Court found that the physical evidence hereinbefore referred dissipated such a situation. The second question involved was whether or not items billed as extras were properly extras or were they items included within the terms of the contract of January 29, 1951 and on this point the trial Court went into minute detail of each item claimed as extras on the part of the plaintiff other than those which were admitted by defendant and even including those items of extras numbered 41 to 60 inclusive claimed during progress of trial. On these items claimed at trial the Court found, including items

admitted, the sum of \$3,781.50 which was paid by defendant under stipulation during trial to the three lien claimants in this action and by which defendant made an overpayment of \$435.30 for which a judgment was entered in his favor.

It is therefore respectfully submitted that the trial Court should be affirmed in its judgment.

Respectfully submitted,

W. D. BEATIE

*Attorney for Defendants and
Respondents Parry.*