

1957

Pacific Coast Title Insurance Co. v. Hartford Accident & Indemnity Company : Brief of Pacific Coast Title Insurance Co, Respondent

Utah Supreme Court

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1957

Clerk, Supreme Court, Utah

IN THE SUPREME COURT
of the
STATE OF UTAH

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

vs.

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

Case No. 8719

8720

BRIEF OF PACIFIC COAST TITLE
INSURANCE COMPANY, RESPONDENT

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Pacific Coast Title Insurance
Company

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BRIEF OF PACIFIC COAST TITLE
INSURANCE COMPANY, RESPONDENT

STATEMENT OF FACTS

Respondent, Pacific Coast Title Insurance Company, adopts generally Appellant's statement of facts, but must add certain matters omitted. This case was consolidated for trial with two other cases likewise involving suits against Hartford Accident & Indemnity Company and all arising out of the same Contract Bond (Ex. Pr-1) which reads as follows, (Appellant quoted only certain portions) :

“KNOW ALL MEN BY THESE PRESENTS:

That We, CASSADY COMPANY, Inc., a Utah corporation, and C. P. CASSADY of Arcadia, California, (hereinafter called the PRINCIPAL) and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, with its principal office in Hartford, Connecticut, and authorized to transact surety business in the State of Utah, (hereinafter called the SURETY) are held and firmly bound and obligated unto PRUDENTIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, a corporation of the United States of America, (hereinafter called LENDER OBLIGEE) and unto FELT SYNDICATE, a corporation of the State of Utah, (hereinafter called the OWNER OBLIGEE), and unto PACIFIC COAST TITLE INSURANCE COMPANY, a corporation of the State of Utah (hereinafter called TITLE OBLIGEE), as their respective interests may appear as obligees in the sum of SEVEN HUNDRED SIXTY THREE THOUSAND AND NO/100 (\$763,000.00) DOLLARS lawful money of the United States of America, for the payment of which PRINCIPAL AND SURETY bind themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, the PRINCIPAL has entered into a contract with the OWNER OBLIGEE for the construction of dwelling houses and appurtenant improvements in a housing project known and designated as Morningside Heights Subdivision, located in Salt Lake County, Utah, which contract is by reference incorporated herein and made a part hereof; and

WHEREAS, the LENDER OBLIGEE has agreed to lend to each qualified borrower, upon the security of a first lien mortgage, a sum of money to be used in the construction of a dwelling house and appurtenant improvements upon a lot in said housing project owned by the borrower; and

WHEREAS, the funds loaned by the LENDER OBLIGEE on the security of said first lien mortgage will be used with the consent of the borrower in making payments due the PRINCIPAL under said contract; and

WHEREAS, the TITLE OBLIGEE will issue ATA title insurance policies on each lot or parcel of real estate upon which the LENDER OBLIGEE makes a mortgage loan as herein stated; and

WHEREAS, the LENDER OBLIGEE, TITLE OBLIGEE, and OWNER OBLIGEE each desire protection as their interests may appear, in event of default by the PRINCIPAL under said contract, said protection to be subject to the performance by the LENDER OBLIGEE, the TITLE OBLIGEE, and the OWNER OBLIGEE of their respective obligations to the PRINCIPAL in connection with said contract;

NOW, THEREFORE, the condition of this obligation is such that if the PRINCIPAL well and truly performs all the undertakings, covenants, conditions and agreements of said contract on its part and fully indemnifies and saves harmless the obligees from all loss, cost, damage, and expense which they may suffer, either jointly and severally, by reason of failure so to do, and fully reimburse and

repays obligees all outlay and expense which said obligees may incur in making good any such default; and, further, if the PRINCIPAL shall pay all persons who have contracted, or will have contracted, directly with PRINCIPAL for services or labor or materials furnished under the provisions of said contract, and shall keep and maintain each lot or building-site free and clear of labor and material liens, then this obligation shall be void; otherwise, it shall remain in full force and effect.

The foregoing, however, is subject to the following provisions:

1. The LENDER OBLIGEE shall have prior right and lien under this Bond as against the other Obligees herein named.

2. The SURETY and PRINCIPAL agree that, in the event the PRINCIPAL shall default in the performance of the undertakings, covenants, terms, conditions, and agreements of said contract on its part, the SURETY will have the option to cure and remedy said default and complete performance of said contract.

3. The SURETY shall not be liable under this Bond to the Obligees, and either of them, unless the Obligees, or either of them, shall make payment to the PRINCIPAL in reasonable compliance with the terms of said contract as to payments, and each shall perform all other obligations to be performed by each Obligee under said contract at the time and in the manner therein set forth.

4. The SURETY agrees that any right of action or claim that either of the Obligees

herein might have under this Bond may be subordinated to the other, and that such subordination will in no manner invalidate or qualify this Bond. The SURETY further agrees to recognize any such agreement of subordination and priority upon being furnished with signed evidence thereof.

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

6. The prior written approval of SURETY shall be required with regard to any changes or alterations in said contract where the cost thereof, added to prior changes or alterations, causes the aggregate cost of all changes and alterations to exceed 10 per cent of the original contract price; but, except as to the foregoing, any alterations which may be made in the terms of the contract, or in the work to be done under it, or the giving by the Obligees of any extensions of time for the performance of the contract, or any other forbearance on the part of either the Obligees or PRINCIPAL to the other, shall not in any way release SURETY or PRINCIPAL of the obligations of this instrument, notice of SURETY of any such alterations, extensions, or forbearance being hereby waived.

7. The aggregate liability of SURETY hereunder to the Obligees or their assigns is limited to the penal sum above stated, and SURETY, upon making any payment hereunder shall be subrogated to, and shall be entitled to an assignment of, all rights of the payee, either against PRINCIPAL or against any other party liable to the payee in connection with the loss which is the subject of the payment.

SIGNED, SEALED AND DATED
21st day of July, 1950.
PREMIUM ON THIS
BOND IS \$7,630.00

CASSADY COMPANY, INC

By /s/ C. P. Cassady

/s/ C. P. Cassady

C. P. Cassady

HARTFORD ACCIDENT AND
INDEMNITY COMPANY

By /s/ A. L. Blackburn

A. L. Blackburn,

Attorney-in-Fact"

The reason for this bond was that one hundred mortgage loans were necessary to finance the Morningside Heights project. Prudential would not loan the money unless Title Company would insure their 100 mortgages (as yet unexecuted and the mortgagors unknown) as first liens as required by its correspondent Prudential Insurance Company of America and the U. S. Veterans Administration. The Title Company would not insure the mortgages as first liens, as and when executed, because work

had been started on some of the subdivision lots. Thus a bond was required where not only the then owner (Felt) was an obligee but also Prudential and the Title Company had to be obligees or no A.T.A. policies of title insurance would have been issued on the proposed mortgages.

The financing program was such that individual loans were to be made to veteran purchasers of the lots in Morningside Heights and until and when each lot had been sold, a note and mortgage executed, the proposed veteran-borrower approved by the lending institution and the U. S. Veterans Administration, the mortgage actually recorded and the A-T-A policy of title insurance issued, Prudential had no right or duty to disburse any funds. This same procedure had to be repeated 100 times as such was a prerequisite to the disbursing of funds on each and all of the 100 separate loans and all were advised in advance of such requirements.

Appellant's statement of facts reflects that problems arose between the Cassadys as contractors, the suppliers of materials, Felt Syndicate and Prudential throughout the last five months of 1950. In compromise settlement of such difficulties, the contractor, Cassady, which had agreed to complete all 100 houses within 180 days from July 19, 1950 (Exh. PR-2), sought and received an extension of time for completion up to June 1, 1951. This was

by "Supplemental Agreement" dated February 16, 1951 (Exh. PR-6).

In partial recognition of delays and the increase of costs and in an apparent effort to compromise the claims made by Cassady as to Felt's responsibility therefor, this Supplemental Agreement of February 16, 1951 in paragraph I of Article III increased the price per house to be paid by Cassady. The parties also confirmed and approved all disbursements of the funds paid by Prudential to Associated Accountants and then Felt, 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." And then they further, "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 Supplement Agreement."

This said document (PR-6) extending the time of completion, establishing new disbursing procedures and discretionary powers in Prudential and acknowledging the full accounting by Prudential to date, was then signed by all parties including Pacific Coast Title Insurance Company as Title Obligee

and also by Hartford as the Surety Company.

In this case there was a stipulation of facts (Title Co. R 11-13) which reads:

“The parties hereto for the purpose of this proceeding, stipulate that the following facts may be received and considered by the Court as fully in the determination of the issues herein along with other testimony as if such had been testified to directly by competent witnesses at the trial thereof.

1. That plaintiff is a Utah corporation and at all times mentioned herein was and is duly licensed to engage in business as a title insurance company in the State of Utah.

2. That the defendant, Hartford Accident and Indemnity Company, is an insurance corporation having its principal office in Hartford, Connecticut, but is duly licensed to and is actually engaged in the transaction of a surety business in the State of Utah.

3. That for the sum of \$7630.00 premium paid to the defendant, Hartford Accident and Indemnity Company, the defendant executed and delivered a document designated as “Contract Bond” dated July 21, 1950 for the sum of \$763,000.00 in words and figures as shown by Exhibit No. 1 at Pretrial.

4. That plaintiff was a party to said bond, designated as the “Title Oblige.”

5. That said bond was issued in conjunction with an agreement for the erection of one hundred dwelling houses and appurtenant improvements on one hundred lots in a subdivision of Salt Lake County, known and

designated as Morningside Heights Subdivision, whics said agreement is dated July 19, 1950 and designated as pre-trial Exhibit No. 2 and a loan agreement designated as Exhibit No. 7 at pre-trial, dated June 16, 1950.

6. That plaintiff issued A.T.A. policies of title insurance on each and all of the said one hundred lots and dwelling houses in Morningside Heights Subdivision as and when Prudential Federal Savings and Loan Association completed a mortgage loan on each of said lots and plaintiff did show such mortgage as a first lien against the several lots without any exception for possible material men's, laborers', or subcontractors' liens against the property. The first policy was issued August 15, 1950 and the last one on December 8, 1950.

7. That in fact the claims of material men, laborers and subcontractors were not paid by the principal and several lien claims and amended lien claims were filed against the said one hundred lots in the Morningside Heights Subdivision and action was brought in the District Court in and for Salt Lake County, Utah to foreclose such lien claims, being Civil No. 98,351 entitled *Welch Planing Mill, Inc. v. Felt Syndicate, Inc. et al.*

8. That plaintiff did not handle the disbursement or distribution of any of the funds involved in the construction of the premises, nor received any of the proceeds of the mortgages, except such sums as were paid to it through its agent, Security Title Company at Salt Lake City, Utah, for the regular premiums on the insurance of the mortgages referred to above.

9. That on August 27, 1953, written demand was duly made by the Prudential Federal Savings & Loan Association, as the mortgagee and holder of the said one hundred mortgages and the A.T.A. policies of title insurance, that plaintiff defend it and said mortgages against the litigation filed by lien claimants.

10. That the plaintiff thereupon engaged legal counsel and they appeared in said litigation as counsel for Prudential Federal Savings & Loan Assn. in opposition to the liens so filed and in all phases thereof from about May, 1953 to and including October of 1955, and has expended in such defense the sum of \$3600.99 for expenses of depositions, attorneys' fees and court costs, all of which were reasonably necessary and proper and related to the defense against said material men's and subcontractors' liens.

11. That the litigation, Civil No. 98351 involved the proposed foreclosure of liens and amended liens filed by Welch Planing Mill, Inc., Standard Lumber Company, Garold E. Jackson, Star Plumbing and Heating Company, Inc., I. A. Thompson, Nu-Way Builders Supply Company and Elias Morris & Sons Company. Those lien claims and amended lien claims were compromised and settled the actions dismissed with prejudice on or about October 5, 1955.

12. That the monies paid to the lien claimants for such compromise settlements were advanced by Prudential Federal Savings & Loan Association and by Hartford Accident & Indemnity Company and such settlement

was made with a full reservation of all rights between Felt Syndicate, Inc., Prudential Federal Savings & Loan Association and Hartford Accident & Indemnity Co. That plaintiff's counsel participated in arranging said compromise settlement negotiations and signed the final stipulation therein on behalf of Prudential Federal Savings & Loan Association.

13. That no final adjudication was made as to any of the lien claims because of the compromise settlement of the litigation.

14. That the litigation relating to the enforcement of the numerous liens, being Civil No. 98,351 as referred to above, was collateral litigation necessary to determine the extent and nature of the liens and plaintiff's rights under said Contract Bond and such was not completed until on or about October 4, 1955.

15. That defendant has refused to reimburse plaintiff for its said expenses and costs in defending Civil No. 98,351."

The issuance of the A-T-A policies of title insurance required that the property be inspected to ascertain whether any work had been commenced or materials delivered on the site prior to recording the mortgages. The examination of the title and the inspection of the premises was handled by Surety Title Company and it then issued a preliminary report to Prudential to show the status of the titles and the mortgagability. Exh. Pac. 27 is such a preliminary report on the 100 lots. It is dated June 22,

1950 and on page 2 recites as an exception to marketability, "9. The construction of improvements having been commenced on said property, no liability is assumed as to liens that may be filed in connection with said improvements."

Mr. Mark D. Eggertsen, President of Security Title Company (agent for Pacific Coast Title Insurance Company) testified that they were requested to write policies of title insurance on the 100 mortgages as first liens granting "full coverage" but they would not do so normally without putting in an exception for possible rights of materialmen and laborers once construction was started ahead of the mortgages. They "would not issue a full coverage A.T.A. policy unless a bond was furnished" (Tr. 170) because basements had already been dug. He then testified that they relied upon the bond from Hartford in issuing the 100 policies on the Prudential mortgages without any exception for mechanics liens and materialmens liens.

The loss sustained by this plaintiff represented attorneys fees, travel, depositions and similar costs and expenses relating to the defense of the priority of the 100 mortgages from the attack of materialmen who had filed liens against the 100 lots in Morningside Heights Subdivision. Defendant has stipulated as to the amount of said costs and expenses. No claim is made that Pacific Coast Title Insurance

Company at any time or in any manner breached its obligations in the transaction or under any contract.

POINTS

POINT I

THE FINDINGS AND JUDGMENT IN FAVOR OF PACIFIC COAST TITLE INSURANCE COMPANY ARE SUPPORTED BY SUBSTANTIAL, COMPETENT AND MATERIAL EVIDENCE.

POINT II

THE BREACH OF THE CONTRACT BY FELT OR ANY OTHER PARTY, IF ANY, DOES NOT BAR RECOVERY BY PACIFIC COAST TITLE INSURANCE COMPANY.

POINT III

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

POINT IV

DEFENDANT IS A COMPENSATED SURETY AND THE CONTRACT BOND MUST BE CONSTRUED MOST STRONGLY AGAINST THE SURETY.

POINT V

THE JUDGMENT OF THE TRIAL COURT IS SUPPORTED BY THE EVIDENCE AND IS CONSISTENT WITH THE LAW.

ARGUMENT

POINT I

THE FINDINGS AND JUDGMENT IN FAVOR OF PACIFIC COAST TITLE INSURANCE COMPANY ARE SUPPORTED BY SUBSTANTIAL, COMPETENT AND MATERIAL EVIDENCE.

Appellant seems to take only one approach in opposing the Title Company's judgment. That is set forth in its Point VII wherein it asserts that the "Title Company did not sustain any compensable damage . . ." The last "Whereas" clause of the bond recites that "the Lender Obligee, Title Obligee and Owner Obligee each desire protection as their interests may appear, in the event of default by the principal under said contract, . . ." (underscoring ours).

Then the bond undertakes in the next paragraph to indemnify and save harmless the obligees "from all loss, cost, damage, and expense which they may suffer . . ." and further ties this obligation to the duty of the Principal (Cassady) to pay all persons who have contracted for labor or materials "and shall keep and maintain each lot and building site free and clear of labor and material liens . . .".

The stipulation of facts set forth above in this case shows the filing of liens on the one hundred lots, the filing of a case, Civil No. 98,351 to fore-

close the liens, the demand by Prudential that the Title Company defend the first lien of the mortgage against the lien claims; and the expenditure of \$3600.99 by the Title Company was "for expenses of depositions, attorneys fees and court costs, all of which were reasonably necessary and proper and related to the defense against said materialmen's and subcontractors' liens."

Can it be said that these costs of depositions, attorneys fees and court costs were not within the contemplation of the parties? These are the very things for which the Title Company sought, in part, protection by means of the bond. The filing of materialmen's liens and the necessity of defending the mortgages against the same or paying such were real threats in light of the fact that construction had been started on the project well in advance of the recording of any of the 100 mortgages. This was not a vague imagination as the record shows that work had been started by way of basement excavations prior to the Title Company's preliminary report on June 22, 1950 while the basic contract between Felt & Cassady was not executed until July 19, 1951 and the Contract Bond guaranteeing its performance was not signed until July 21, 1951.

Appellant has cited a few cases in which a decision has stated that attorneys fees are not recoverable unless a specific contractual provision so pro-

vides. We feel that such cases are not in point under the type of bond here involved. This compensated surety, Hartford, has agreed to pay “all losses, cost, damage, and expense.”

Appellant’s leading case is *Dahl v. Prince*, 119 Ut 556, 230 Pac. (2d) 328. This was a claim and delivery action for a Buick automobile in which the trial court found for the plaintiff and tacked on attorneys fees as a measure of the damages for the wrongful taking of plaintiff’s car by defendant. The Supreme Court reversal of such a holding in a claim and delivery case may well be proper, but that is no precedent to deprive our plaintiff from recovery of deposition expenses, attorneys fees and court costs under a written agreement which bound Hartford to pay *all* loss, cost, damage and expense incurred by the Title Company.

In, *Patterson v. Rinard*, 81 111 App 80, it was held that the obligees of an injunction bond could recover for the use of their attorneys for attorneys fees, since attorneys fees are “damages”.

The case of *Employers’ Indemnity Corporation v. Southwest Nat. Bank*, Texas, 299 S.W. 676 involved an action on a surety bond which agreed to save harmless, . . . “against all loss, damage, liability, expense or costs . . .” Some \$5500.00 was expended on attorneys fees by the obligee and the Court

awarded judgment not only for the original attorneys fees incurred but also for attorneys fees in recovering the attorneys fees. The appellate court held that under the bond, attorneys fees were "damage" and "expense".

The Utah Supreme Court in the case of *Swaner v. Union Mortgage Co.* 105 Pac. (2d) 342, 99 Utah 298 held that the word "damage" in conjunction with the defendant's failure to release a mortgage included attorneys fees. The statute at issue, Sec. 78-3-8, R.S.U. 1933 authorized an award of "the costs of suit and all damages resulting from such a failure". A careful analysis of the earlier holdings of your Court and of other states was made and then the opinion stated, "We believe that 'all damages' includes the damage one incurs when compelled to employ an attorney to bring legal action to procure a release of the mortgage." We note that the bond in our present case is much broader as it reads, "all loss, cost, damage, and expense".

In another Utah case the word "expenses" was held to include attorneys fees. This was the construction placed by your Court in *Foreman v Foreman*, 176 Pac (2d) 144, 111 Utah 72, on Sect. 104-5-11, U.C.A. 1943 relating to "costs and expenses" in contempt proceedings. Other cases can be cited to further fortify our position that the language of the present bond requiring payment of all loss,

cost, damage and expense includes necessarily the attorneys fees and court costs expended in defending the insured mortgages against the lien claimants; particularly when the bond and the prime contract both contain specific promises that they shall keep each lot or building-site free and clear of labor and material liens."

This, a law case for breach of contract and the trial court's findings are supported by adequate, competent and material evidence. In this case all basic facts were stipulated and the defendant bonding company has never, and does not now, contend that the Title Company has in any manner breached its obligations under the bond or any other agreement. The reliance of the Title Company upon the bond as a condition precedent to the writing of the A.T.A. policies is undisputed in the evidence.

The well established and oft repeated rule in Utah is that in a law case, such as the present one, where there is substantial, competent evidence to support the findings of the trial court, those findings will not be disturbed: *Knudsen Music v. Masterson* 121 Ut. 252, 240 Pac. (2d) 973. Also, that the plaintiff, having prevailed in the trial Court, is entitled to the benefit of having the evidence viewed in the light most favorable to him, together with every inference and intendment fairly and reasonably arising therefrom, *McCollum v. Collier*, 121 Ut. 311, 241 Pac. (2d) 468.

POINT II

THE BREACH OF THE CONTRACT BY FELT OR ANY OTHER PARTY, IF ANY, DOES NOT BAR RECOVERY BY PACIFIC COAST TITLE INSURANCE COMPANY.

POINT III

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

These two points should be considered together because appellant bonding company places great stress on a theory that a breach by one party binds all others. Hartford has received its premium and now seeks to escape its liability to the several obligations on the bond by asserting a breach of contract by one or more of them. Once again, we note that absolutely no breach of any contract is asserted against the Title Company.

The project involved over \$1,000,000.00 in mortgage loans and required a rapid construction schedule by the contractor Cassady to complete within the 180 days as agreed upon by it and guaranteed by Hartford. When problems arose in the last five months or so of 1950, the interested parties conferred. Felt, Cassady & Prudential were the parties to the construction contract and the financing program. The asserted delay supposedly caused by Felt failing to sell the lots to Veterans as soon as they

hoped and other minor items, as well as the slowness of finances due to the reluctance of eligible Veterans to undertake the purchase of new, but yet unbuilt, homes in the face of the Korean situation, the inability of Prudential to disburse money until qualified Veteran mortgages had been approved and recorded, and all other complaints, including increases in costs for materials, were compromised. This was done by the Supplemental Agreement of February 16, 1951 (Exh. PR-6) referred to in the statement of facts. No material, alleged breaches of any type can be shown to have occurred by either Felt or Prudential after such date.

Each of those two litigants, Felt & Prudential are filing briefs as to their respective positions and we therefore will not attempt to duplicate such matters. Suffice it to say that there is no evidence of the substantial or material asserted breach which had not been either justified by the evidence or compromised by the February 16, 1951 Supplemental Agreement, acceded to by Hartford.

If there were any alleged breaches by Felt, no legal or actual prejudice to Hartford has been shown by the evidence. The general rule as stated in 30 Am Jur 1115 is that a departure from the contract will not have the effect of discharging a compensated surety unless it appears that such departure has resulted in injury, loss or prejudice to the sur-

ety — there must be a *material* variance from the contract.

To take this one step further, we believe that the Contract Bond now before the Court cannot be read to absolve Hartford from its liability to one obligee even if another obligee had failed in its responsibilities. As such relates to the Title Company, the prime contract obligated Cassady to keep the premises free from liens and encumbrances. This obligation was then guaranteed and repeated in the Contract Bond by Hartford.

A usual construction bond runs in favor of the owner as obligee, but here two additional obligees were added because of the importance of the issues, Prudential as the “Lender Oblige” and the Title Company as the “Title Oblige”. In the preamble, the Bond recites that Cassady as “Principal” Hartford as “Surety” are held and firmly bound and obligated unto the Lender Oblige, the Owner Oblige and the Title Oblige, “as their respective interests may appear as obligees” in the sum of \$763,000.00. Then each Oblige’s relationship was stated, Title Company being obligated to issue A.T.A. title policies on each lot wherein a first mortgage loan was made by Prudential.

The “NOW, THEREFORE” paragraph recited the obligation of the Principal to keep and main-

tain each lot and building-site free and clear of labor and material liens. Paragraph #3 is the condition under which Hartford seeks an escape from liability, it reads:

“3. The SURETY shall not be liable under this Bond to the Obligees, and either of them, unless the Obligees, or either of them, shall make payment to the PRINCIPAL in reasonable compliance with the terms of said contract as to payments, and each shall perform all other obligations to be performed by each Obligee under said contract at the time and in the manner therein set forth.”

Please note that it refers to the prime contract only between Felt and Cassidy which was dated July 19, 1950. The Title Company was not a party to said contract and hence had no obligations under it. Prudential was not a party to said contract and hence had no obligations to perform under it.

No evidence is in the record from which it could be inferred that the Title Company was ever considered obligated to pay the moneys or perform the obligations of Felt to Cassidy under said contract. Thus the matter of defense raised by the bonding company was never in the contemplation of the parties and was impossible of performance by the Title Company. Though Prudential is not a party to the prime contract yet it did undertake separately to loan moneys to qualified Veteran borrowers upon

the security of first lien mortgages, but nothing could be inferred whereby the Title Company might be construed to be liable to make those mortgage loans.

An ambiguous escape clause is the most that can be said for Hartford's defense and appeal. Certainly the primary covenants and obligations of the bond are clear.

The background of the issuance of the bond, to-wit, that the Title Company would not insure the mortgages as first liens, against the possibility of materialmen's liens unless it was fully indemnified by the bond, is likewise uncontested.

It is contrary to the policy of the law to permit a bonding company to escape from its agreed guaranty of performance by the contractor unless the terms of the bond giving it an excuse are clear and unambiguous and unless the breach complained about is substantial and material. Neither situation exists here. As between the Title Company and Hartford, the Bond was prepared only by Hartford and the language used therein is Hartford's language, and must be construed most strongly against it.

POINT IV

DEFENDANT IS A COMPENSATED SURETY AND THE CONTRACT BOND MUST BE CONSTRUED MOST STRONGLY AGAINST THE SURETY.

On the face of the Bond a premium of \$7,630.-

00 is recited and acknowledged. Hartford therefore stands not as a mere voluntary friend who has guaranteed performance of a contract, but as a compensated, corporate surety engaged in the business of guaranteeing contractual performance. The contract of such a compensated surety is construed most strongly against it; see 30 Am. Jur. 1112.

Some rules for construing these surety bonds are set out in two Utah cases: *H. M. Walker Realty Co. v. American Surety Co.* 60 Ut. 435, 211 Pac. 998 and *Deluxe Glass Co. v. Martin*, 116 Ut 114, 208 Pac. (2d) 1127. In the Walker case the Court held (p. 1010) that as to a surety who makes insurance a business, doubtful provisions of a contract are construed in favor of the insured. The Court also repeated the rule that recourse may be had to the intent of the parties and the existing conditions for construing a nagreement of this type.

The DeLuxe Glass case further expended the rules of construction. The construction contract and the surety bond are to be construed together. We feel certain that this rule applied to the present case will reflect only duties between Felt and Cassidy and will not enable Hartford to run away from its guaranty of such performance after those two parties in February of 1951 compromised their differences by the Supplemental Agreement, nor infer

uncontracted obligations on Title Company or Prudential.

Little has been said in this brief about the basic cause of the debacle, to-wit, Cassady's failure to build the 100 houses within 180 days or the extended period, or to ever complete them in conformance with its contract so as to entitle the mortgages thereon to approval by the U. S. Veteran's Administration. As appellant, Hartford admits such, but emphasis seems to be shifted to minor, technical, claimed infractions on the part of Felt and Prudential. It was Hartford which trusted Cassady to build the 100 houses according to the V. A. requirements and within the time specified. It took a fee and it gambled and guaranteed that Cassady would perform. Felt, Prudential and Title Company did not assume that risk. Rather, they relied upon Hartford's performance bond, not upon Cassady.

Hartford had ample opportunity to protect itself prior to writing the bond. It had access to financial statements, investigations, indemnifications by others and the multiple devices at a compensated surety's disposal. After taking all steps and precautions deemed necessary, and a very substantial fee, Hartford then underwrote Cassady's performance in the manner and time specified by the July 19, 1950 contract. Then, and only then, did this Title Obligee undertake to insure the mortgages as

and when they were executed and recorded.

The trial Court found in part, Finding 6 and 7, (R. Pac. 18) :

“6. That the defendant as surety executed and delivered said Contract Bond to induce the plaintiff to insure the individual mortgages, that were then about to be executed on the said one hundred lots and dwelling houses, as first liens thereon without any exception for the possible liens of materialmen, laborers or subcontractors, and to induce plaintiff to issue one hundred A.T.A. title insurance policies in favor of Prudential Savings and Loan Association showing the several mortgages as first liens on the respective lots.

7. That in reliance upon said Contract Bond and upon the financial responsibility of HARTFORD ACCIDENT AND INDEMNITY COMPANY as the Surety therein, the plaintiff did in fact issue A.T.A. policies of title insurance on each and all of the said one hundred lots and dwelling houses in Morning-side Heights Subdivisions as and when Prudential Federal Savings & Loan Association completed a mortgage loan on each of said lots and plaintiff did show such mortgage as a first lien upon the several lots without any exception for possible materialmen's, laborers', or subcontractors' liens against the property.”

Under the section of American Jurisprudence, Vol. 9, P. 58, dealing with construction contracts and Bonds we find that contractor's bonds such as this, “. . . will be construed most strongly against a compensated surety and in favor of obligee or bene-

ficiaries under the bond." And at 12 Am. Jur. 795 we read:

"§ 252. Interpretation in Favor of One of Parties. — Doubtful language in contracts should be interpreted most strongly against the party who uses it. A written agreement should, in case of doubt, be interpreted against the party who has drawn it. Sometimes the rule is stated to be that where doubt exists as to the interpretation of an instrument prepared by one party thereto, upon the faith of which the other has incurred an obligation, that interpretation will be adopted which will be favorable to the latter. It is said that an instrument uncertain as to its terms is to be most strongly construed against the party thereto who causes such uncertainty to exist. Thus, the general rule is that a doubtful or ambiguous contract for the professional services of the attorney who drew it should be construed in favor of the client. The rule that expressions will be interpreted against the person using them applies only where, after the ordinary rules of interpretation have been applied the agreement is still ambiguous. It is also said that if other things are equal, an interpretation most beneficial to the promisee will be adopted when the terms of an instrument and the relationship of the parties leave it doubtful whether words are used in an enlarged or a restricted sense. To state the same proposition conversely, it may be said that everything is to be taken most strongly against the party on whom the obligation of the contract rests. Thus it is said that an offer and a promise therein contained must be construed most strongly against the offerer."

POINT V

THE JUDGMENT OF THE TRIAL COURT IS SUPPORTED BY THE EVIDENCE AND IS CONSISTENT WITH THE LAW.

The foregoing summary of the agreed and stipulated facts and the disputed evidence averred to above demonstrate that the trial Court had substantial, competent and material evidence before it upon which to make the findings of fact. The only direct attack upon the Title Company's judgment was upon the theory that the damages (stipulated as to amount) were admitted but not compensable. We have fully answered that in our argument on Point I. The collateral attacks by Hartford generally on all of the other legal matters have likewise been answered above.

The Trial Court heard the evidence, saw the witnesses, listened to the arguments of counsel and then rendered judgment in favor of the Title Company. No sound or justiciable premise has been advanced to over-throw this judgment. The burden is clearly upon Appellant, Hartford, to show clear and consistent grounds before a reversal will be granted.

We urge that the findings and judgment of the Trial Court be affirmed.

Respectfully submitted,
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