

1958

Pacific Coast Title Insurance Co. et al v. Hartford
Accident & Indemnity Co. et al : Answer of
Respondent to Petition for Rehearing and Brief in
Support of Answer

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

UNIVERSITY UTAH
DEC 19 1958

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PACIFIC COAST TITLE
INSURANCE COMPANY,
a corporation,

Plaintiff and Respondent,

vs.

HARTFORD ACCIDENT &
INDEMNITY COMPANY,
a corporation,

Defendant and Appellant.

Clerk, Supreme Court, Utah

Case No. 8719

ANSWER OF RESPONDENT TO PETITION
FOR REHEARING AND
BRIEF IN SUPPORT OF ANSWER

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Company

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

vs.

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

} Case No. 8719

ANSWER OF PACIFIC COAST TITLE
INSURANCE COMPANY TO PETITION
OF HARTFORD ACCIDENT & INDEMNITY
COMPANY

The appellant herein, Hartford, has filed a Petition for Rehearing. Respondent, Pacific Coast Title Insurance Company hereby answers said Petition and alleges:

1. There can be no misapprehension of facts in this case as the parties stipulated as to almost every material fact in this particular case.
2. Every item mentioned and argued by Hart-

ford in its Petition for Rehearing has been covered by the briefs of counsel, in the oral argument and considered by the court.

3. The opinion of the Court is consistent with the applicable law of contracts.

BRIEF IN SUPPORT OF ANSWER

POINT I.

THERE CAN BE NO MISAPPREHENSION OF FACTS IN THIS CASE AS THE PARTIES STIPULATED TO ALMOST EVERY MATERIAL FACT IN THIS PARTICULAR CASE.

Appellant apparently overlooked the Stipulation of Facts in this case (R. 11-13) page 9 to 12 of the Title Company Brief. The 15 stipulated facts form a complete basis for the cause of action asserted by the Title Company and sustained by the court. The undisputed testimony of Mr. Mark D. Eggertsen further established that because work had been started on the project and basements dug before a single mortgage was recorded, the bond was required to protect the Title Company against the potential liens of materialmen. (See pages 12 and 13 of Title Company brief).

Hartford implies that the Court has "misunderstood or misconceived" some of the facts. It appears that Hartford is contesting the semantics of the opinion rather than the justice and wisdom thereof. By quoting a few minor excerpts from the body of

the opinion, Hartford in its Point I has sniped at the opinion without covering some basic factors.

The burden of Hartford's complaint seems to be, now that the extensions of time, variations of payment procedures and other beneficial rearrangements have been accomplished between Cassady, Felt, Prudential and Associated Accountants, such are not binding upon Hartford and in effect pro tanto varied the basic contract so Hartford could slide out from under its surety obligation. (Note: No change or aggregate of changes and alterations increased the contract price up to 10%).

Paragraph 6 of the Contract Bond at issue reads:

“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 Obligee of any extension 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.”

Thus the inevitable re-adjustments, extensions of time, changes, alterations, etc. were anticipated. Upon such a premise, it was agreed that no notice of such alterations need be given to Hartford of the changes and extensions such as were contained in the February 16, 1951 modification. Therefore, the endorsement of that February 16th Supplemental Agreement was unnecessary, but nevertheless Hartford did endorse it without any repudiation and the trial court found (Finding No. 30) :

“Hartford had full knowledge of the contents and purposes of said Supplemental Agreement of February 16, 1951 (PR 8) and upon presentation of the Agreement to it, Hartford did not repudiate or reject it, but affirmatively consented to the amendment of certain provisions of the several agreements affected by said Supplemental Agreement as herein particularly described. No changes or alterations in said contract dated July 19, 1950 between Syndicate and Cassady (PR 2) as amended were made whereby the cost of the project added to prior changes and alterations, caused the aggregate cost of all changes and alterations to exceed 10% of the original contract price, nor was such a change effected by the Supplemental Agreement of February 16, 1951 (PR 6) or by any other agreement between Syndicate and Cassady. There were no changes or alterations in the Contract of July 19, 1950 (PR 2) which in aggregate exceeded 10% of the original contract price.”

The court is again referred to the Title Company's original brief as Respondent for a more complete statement of our position.

POINT II.

EVERY ITEM MENTIONED AND ARGUED BY HARTFORD IN ITS PETITION FOR REHEARING HAS BEEN COVERED BY THE BRIEFS OF COUNSEL, IN THE ORAL ARGUMENT AND CONSIDERED BY THE COURT.

POINT III.

THE OPINION OF THE COURT IS CONSISTENT WITH THE APPLICABLE LAW OF CONTRACTS.

The Stipulation of Facts in this Title Company case, coupled with the court's Findings pertinent thereto, form a solid groundwork for the Opinion of this court. It is to be noted that no direct attack is made upon anything done by the Title Company, nor is there any claim of any failure of performance on the part of the Title Company.

To succeed in overthrowing the Findings and Judgment of the trial court and the well-considered Opinion of this court, Hartford must rely upon a few minor breaches by Felt. Briefs heretofore filed have emphasized the sanctity of Findings supported by evidence and the policy of sustaining the liability of a compensated surety. Let us take a look at Finding No. 39 by the trial court:

“Felt Syndicate, Inc. 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 between the parties entered February 16, 1951.”

Early in the court’s history its policy as to petitions for rehearing was announced.

No rehearing will be granted where nothing *new* and *important* is offered for consideration. (emphasis ours)

Ducheneau v. House
4 Ut. 483, 11 Pac. 618
Cummings v. Nielson
42 Ut. 157, 129 Pac. 619

“To justify a rehearing a strong case must be made. The Supreme Court must be convinced either that it failed to consider some material point in the case, that it erred in its conclusions, or that some matter has been discovered which was unknown at the time of original hearing. In *re McKnight*, 4 U. 237, 9 P. 299; *Brown v. Pickard*, 4 U. 292, 9 P. 573, 11 P. 512.”

The whole basic concept of the problems in this litigation was comprehended by the court and reflected in its unanimous opinion. This respondent was designated as “title obligee” in the bond for the reason that it would not and did not rely upon the contractor but insisted upon a bond to protect it from loss. Hartford undertook that obligation.

A loss ensued and now that compensated surety is asking relief from the very obligation which it was paid to assume. Again we believe that the court will rebuff such a prayer.

Appellant initially contended that the Title Company could not recover under the bond because its damages (attorneys fees and costs) were not recoverable under the language of the Contract Bond. This contention now has been abandoned as not one word of criticism of the decision in this respect is found in Hartford's petition for rehearing or the accompanying brief.

Hartford, as appellant, has reverted to one theme, the claimed breaches by Felt bar all recovery by the Title Company. We again reiterate the position argued in our brief on appeal, that such a strict and ruthless interpretation of the Contract Bond is contrary to well established rules of law and equity.

It is entirely true, as appellant claims, that it argued the "escape" clause and we answered that contention in the original briefs in this case. We knew that Hartford's only hope for a way out of its liability was via that phrase. We also knew and recognized that such a narrow, punitive, forfeiture clause could not be construed as Hartford desired if the normal rules of construction were applied.

The court did read those briefs and hear the arguments of counsel thereon. It therefor ill be-

comes the appellant to now claim that the court did not "consider the principal contention asserted by Hartford for reversal of the judgment below." There is no duty imposed upon an appellate court to analyze, dissect and repeat every contention of an unsuccessful appellant.

The opinion clearly shows that the court read, heard and understood appellants oft repeated plea under the escape clause, as the court said:

"The principal basis of Hartford's attack upon the judgments is that the plaintiffs themselves were guilty of breaches of their contractual duties, which prevented its principal, Cassady, from performing his obligations. Inasmuch as the trial court found in favor of the plaintiffs, they are entitled to have us review the evidence and every reasonable inference fairly to be drawn therefrom in the light most favorable to them."

WHEREFORE, Respondent, Title Company, prays that the Petition for Rehearing be denied, and that the case be remanded to the trial court upon the basis of the opinion as now published by the court.

Respectfully submitted,

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