

1958

Prudential Federal Savings and Loan Association et al v. Hartford Accident & Indemnity Co. et al :
Answer of Prudential Federal Savings and Loan Association to Petition for Rehearing of Hartford Accident and Indemnity Co.

Utah Supreme Court

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IN THE SUPREME COURT COUNTY UTAH
of the
STATE OF UTAH

DEC 19 1958

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

VS

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

Clerk, Supreme Court, Utah

Case No. 8720

ANSWER OF PRUDENTIAL FEDERAL SAV-
INGS AND LOAN ASSOCIATION TO PETITION
FOR REHEARING OF HARTFORD ACCIDENT
AND INDEMNITY COMPANY

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Savings and Loan Association

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LEGEND

“Prudential” refers to Prudential Federal Savings and Loan Association.

“Cassady” refers to Cassady Co., Inc. and C. P. Cassady.

“Felt” refers to Felt Syndicates, Inc.

“Hartford” refers to Hartford Accident and Indemnity Company.

“Pacific” refers to Pacific Coast Title Insurance Company.

“Court” refers to the Supreme Court of the State of Utah.

“Trial Court” refers to the District Court of the Third Judicial District of the State of Utah in and for Salt Lake County.

IN THE SUPREME COURT
of the
STATE OF UTAH

PRUDENTIAL FEDERAL
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a corporation,
Defendant and Appellant.

} Case No. 8720

ANSWER OF PRUDENTIAL FEDERAL SAV-
INGS AND LOAN ASSOCIATION TO PETITION
FOR REHEARING OF HARTFORD ACCIDENT
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POINT I.

THE TRIAL COURT MADE CERTAIN FINDINGS
OF FACT WHICH ARE COMPLETE ANSWERS TO
THE CONTENTIONS OF APPELLANT CONTAINED
IN POINT I OF APPELLANT'S PETITION FOR RE-
HEARING.

Respondent invites the Court's attention to the
following Findings of Fact:

"9. The agreement of July 19, 1950 (PR 2)
was subsequently modified by written agreement
dated September 20, 1950 (PR 5) which recited

that there had been delay in recording the mortgages and thereby a delay was incurred in securing availability of funds and, therefore, the time for completion of the dwelling houses was extended. Hartford agreed to this modification.” (Ex PR 5 and Ex PR 4 support this Finding.)

“10. On August 10, 1950 Syndicate, Prudential, Cassidy and Associated Accountants entered into an agreement (PR 8) which in substance provided that all funds made available by Prudential from proceeds of the veterans’ mortgages should be disbursed by and through Associated Accountants. *Prudential was to transmit available funds to Associated Accountants for disbursement. The disbursements were to be made in accordance with tables attached to the agreement based upon the amount of the funds paid by Prudential to Associated Accountants and the progress of the work. * * * **” (Italics supplied) (Ex PR 8 supports this Finding)

“13. Actual construction work on the project was commenced prior to June 22, 1950 by way of excavating basements and footings for the dwelling houses. This work was performed before any mortgage in favor of Prudential was recorded. As a consequence, all of the parties to the transaction were aware of the fact that liens of unpaid material men and laborers would be senior to the liens of the mort-

gages. Prudential, therefore, demanded that not only the bond (PR 1) described in Finding 12 designating Prudential as an obligee, be executed but also that each mortgage loan be insured by an ATA title policy so as to afford Prudential double protection against senior material and labor liens. Security Title Company, a Utah corporation doing business in Salt Lake City was the resident agent of Pacific Coast Title Insurance Company which agreed to write these policies. It agreed to issue the ATA policies provided, however, Pacific Coast Title Insurance Company was also made an Obligee under the \$763,000.00 bond. (PR 1)” (This finding is supported by substantial evidence found at R. 35, R. 59, R. 60, R. 170, R. 171, R. 172, R. 232, R. 318, R. 319, R. 324, R. 332)

“14. Sales of the homes in Morningside Heights were negotiated by a firm of real estate agents in Salt Lake, acting for and employed by Syndicate. At the times the bond (PR 1) and the contracts above described (PR 2, PR 7 and PR 8) were executed, only part of the dwelling houses were sold. The sale of these houses was an operation which continued into December of 1950. This fact, plus necessary time consumed in processing the mortgage applications by the Veterans Administration through its Salt Lake office and the further fact that the completion of the transactions and

and the securing of the execution of the mortgages by the veterans and their wives required additional time, delayed the recordation of the mortgages in the office of the Recorder of Salt Lake County. Prudential had no duty or authority to disburse any funds for or on behalf of a veteran-borrower unless and until his mortgage was duly recorded. As soon as the mortgage processing was completed and a mortgage was recorded, Prudential promptly transmitted to Associated Accountants then available funds. There was no unreasonable delay or lack of diligence on Prudential's part at any time in effecting disbursement of the mortgage funds." (This Finding is supported by substantial evidence found at R. 362, R. 363, R. 364, R. 366 and by Ex PR 7 and Ex PR 8).

"16. Cassady failed to complete said dwelling houses within the time required by his said contract with Syndicate dated July 19, 1950 (PR 2) as modified by said Supplemental Agreement dated September 20, 1950 (PR 5). By the month of February 1951 none of the dwelling houses had been completed so as to meet the requirements of the Veterans Administration and work on the project had all but ceased. On February 16, 1951, Syndicate, Prudential, Cassady and Associated Accountants executed a Supplemental Agreement (PR 6) whereby they agreed to the amendment in specified par-

ticulars of the Contract of June 16, 1950 between Prudential and Syndicate (PR 7); the contract of July 19, 1950 (PR 2) between Syndicate and Cassady as amended by Agreement of September 20, 1950 (PR 5) and the contract of August 10, 1950 between Prudential, Syndicate, Cassady and Associated Accountants (PR 8) as amended by Agreement of August 22, 1950 (PR 3). By the Supplemental Agreement dated February 16, 1951 (PR 6) the parties agreed:

a. That the dwelling houses should be completed by June 1, 1951 and the failure to complete said houses by said date or default by Syndicate to perform all things necessary to secure final approval of Veterans Administration would give Prudential at its election the right to complete the project (amending Par 7 of Art II of Contract of June 16, 1950 (PR 7)).

b. That all unexpended mortgage proceeds held by Prudential might be disbursed by Prudential at such time or times and in such manner and in such amounts as in the sole judgment and discretion of Prudential was necessary and proper to secure the expeditious completion of said dwelling houses and payment of all material men or laborers (Amending Par 4 of Art I of Contract of June 16, 1950 (PR 7)).

c. Cassady would construct 29 houses instead

of 26 houses based on Floor Plan I for the price of \$7800.00 each; 35 houses instead of 36 houses based on Floor Plan 3 for \$7340.00 each and 36 houses instead of 30 houses based on Floor Plan 4 for \$7920.00 (Amending Par 22 of Contract of July 19, 1950 (PR 2) ;

d. All payments under the Contract of July 19, 1950 (PR 2) would be paid by Prudential to subcontractors through a bonded disbursing agency, but should be at such time or times, and in such manner and in such amounts as Prudential deemed necessary and proper to secure the payment of all subcontractors, material men and laborers (Amending Par 23, Art III of Contract of July 19, 1950 (PR 2).

e. By this supplemental agreement of February 16, 1951 (PR 6) Cassady irrevocably admitted that it had secured from Syndicate and Associated Accountants an accounting of all funds paid by Prudential to Associated Accountants and confirmed and approved all of the disbursements made by Associated Accountants to the date of the agreement.

f. By this Supplemental Agreement of February 16, 1951 (PR 6), Syndicate, Cassady and Associated Accountants admitted they had secured from Prudential an accounting of the proceeds of all mortgage loans and down payments and disbursements thereof by Prudential to date of agreement;

confirmed and approved all disbursements made by Prudential to date of agreement and admitted, agreed and declared that Prudential had performed all of its obligations under the contract of June 16, 1950 (PR 7) the contract of August 10, 1950 (PR 8) and Supplemental Agreement of August 22, 1950 (PR 3) from respective dates thereof to February 16, 1951.” (This Finding is supported by Ex PR 6.)

“17. The Supplemental Agreement dated February 16, 1951 (PR 6) became effective upon approval by Hartford and Pacific Coast Title Insurance Company. This Agreement was approved in full on February 20, 1951 by said Title Insurance Company and was presented to Hartford on the same date, and thereby it gained full knowledge thereof. By endorsement it consented to the amendment of Pars. 22 and 23, Art III of the Contract of July 19, 1950, and Par. 7, Art II of the Contract of August 22, 1950.” (This finding is supported by Ex PR 6)

“29. Any delay in disbursing the mortgage proceeds by Prudential at the commencement of work in the summer of 1950 on the Morningside Heights project was caused by Cassady prematurely commencing work on the project before the execution, delivery and recording of the mortgages executed by the veteran-borrowers. Cassady knew that Prudential would not disburse the mortgage pro-

ceeds until mortgages were properly executed and recorded. The time lag thereby occasioned was the direct and immediate result of Cassady's own action in commencing construction work before mortgage funds were available under the terms of said several contracts. Cassady assumed this risk of his own volition and choice" (This Finding is supported by substantial evidence found at R. 38, R. 39, R. 47, R. 232, R. 233, R. 249, R. 318, R. 319, R. 320, R. 321, R. 322, R. 324, R. 326, R. 327, R. 332, R. 333.)

"31. After the effective date of said Supplemental Agreement of February 16, 1951 (PR 6) Prudential in honesty and in good faith exercised its discretion in disbursing mortgage proceeds in payment of the obligations due to sub-contractors and in payment of laborers and material employed and used in the construction of dwelling houses on said project. Prudential did not withhold or delay the payment of any mortgage proceeds that it was rightfully authorized to disburse." (This Finding is supported by substantial evidence found at R. 104, R. 105, R. 374).

"39. 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.” (This Finding is supported by substantial evidence found in Ex PR 4, Ex PR 5, Ex PR 6, R. 348).

Appellant in its Petition for Rehearing has quoted from the court’s opinion in this case six separate statements which have been removed from the context of the opinion. (Sub-paragraphs 1, 2, 3, 4, 5, 6 of Appellant’s Point I). These quotations are asserted to be proof that the Court’s decision “is based on a misapprehension of certain fundamental facts.” The principal vein of thought which runs through this contention is that Felt breached its contract with Cassady “because Felt failed to pay Cassady the course of construction payments provided in the primary construction contract, and also in the disbursal agreement.”

By way of further defense Appellant argues that Appellant is bound by the Supplemental Agreement of February 16, 1951 (Ex PR 6) only to a limited degree (Subparagraphs 5 and 6, Point I), and hence this Agreement has no bearing upon the ultimate liability of Appellant.

Respondent believes it should again emphasize four propositions in this case, which cannot be denied, by quoting from page 59 of its original brief:

“1. Cassady failed, neglected and refused to procure the 100 dwelling houses in Morningside Heights to be constructed in ac-

cordance with the plans and specifications approved by Veterans Administration. (Hartford admits this fact).

“2. Cassady failed, neglected and refused to secure from Veterans Administration its approval of the construction of such dwelling houses. (Hartford admits this fact).

“3. Because the said dwelling houses were not constructed in accordance with the plans and specifications approved by the Veterans Administration, it refused to guarantee the mortgages owned and held by Prudential. (Hartford admits this fact).

“4. As a result of the refusal of Veterans’ Administration to guarantee said mortgages, Prudential suffered damages. (Hartford on this appeal has neither questioned the amount of damages awarded Prudential nor the method of the trial Court in determining these damages).”

Respondent also quotes from its original brief, (page 60) its comments on the foregoing four propositions:

“It is manifest, therefore, that Cassady was guilty of violation of the contract dated July 19, 1950 between Felt and Cassady (Ex. PR 2) performance of which by Cassady was guaranteed by Hartford. Since Prudential was a third party beneficiary under said contract it had a direct action thereon against Cassady for its violation thereof and an action against Hartford as surety on Cassady’s bond. The bond itself specifically designated Prudential as an obligee thereof and recognized its clear right to claim and sue thereon.”

“Prudential, therefore, respectfully but emphatically asserts to the Court that it has affirmatively made its case against Hartford and the evidence in the action fully supports that conclusion beyond peradventure.”

In order to meet Respondent’s case, Appellant must assume a defensive position and it does this by throwing up the exceedingly thin line of defense that “Felt failed to pay Cassady the course of construction payments.” Appellant has chosen to ignore the Findings of Fact above set forth. At no place in its Petition does it question a Finding of Fact made by the trial Court. Its main attack is upon certain phraseology of the Court’s opinion. The reason for this strategy is obvious — each Finding above quoted is supported by competent, substantial evidence, and to quote from the Court’s opinion:

“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.” (*Buehner Block Co., v. Glezos*, 6 Utah (2d) 226; 310 Pac (2d) 517; *Beck v. Jeppesen*, 1 Utah (2d) 127; 262 Pac (2d) 760.)

1. *Cassady cannot claim a violation by Felt of the “course of construction” payments formula.*

Cassady before entering upon the construction work knew (a) that the only source of funds from

which it was to obtain payment was the proceeds of the veterans' mortgages; (b) that such funds would not be available until the veterans' application was processed by Veterans' Administration; (c) that Prudential must approve the loan; (d) that the veteran and his wife must execute all required mortgage papers; and (e) that the mortgage must be recorded on the public records. Notwithstanding such knowledge, Cassady elected to commence work. It assumed the risk and hazard of such process. Findings 14 and 29 are the only Findings which could have been made by the Trial Court on the evidence in this case. Cassady's difficulties stemmed not from the delay in the "course of construction" payments, but from its own action in commencing construction work before funds were available under the contracts. The Construction Agreement of July 19, 1950 (Ex. PR 2) and the disbursing agreement of August 10, 1950 (Ex. PR 8) to which Cassady was a party, specifically gave Cassady notice as to the source of funds and when and how they were to be paid it. The testimony of C. J. Cassady is replete with admissions of Cassady's complete knowledge of this situation. Cassady cannot enter upon such course of conduct, with full knowledge of the hazards and perils of such "calculated risk" (See Scott's testimony at R. 325, 326, 333) and then when the risk turned against it, attempt to rely upon

the strict terms of the contract. By its own conduct rendered impossible performance by Felt of the "course of construction" formula of the agreement. Upon this state of facts the Trial Court properly found that there had been no substantial breach of contract by Syndicate. (Finding 39).

2. *Cassady by the Agreement of February 16, 1951 (Ex. PR 6) acknowledged full performance by Prudential of the Agreement of June 16, 1950, (Ex. PR 7), the Agreement of August 10, 1950 (Ex PR 8) and of the Agreement of August 22, 1950 (Ex. PR 3), and also admitted it had secured from Felt and Associated Accountants an accounting of all funds paid by Prudential to Accountants.*

Reference to the Agreement of February 16, 1951 (Ex. PR 6) and to Findings 16 and 17 proves that Cassady possessed complete knowledge of the source of the funds which had been paid by Prudential to Associated Accountants, and finally received by it; approved the accounting of same and exculpated Prudential from any charge of breach of the contracts to which Prudential was a party up to February 16, 1951. By this Agreement of February 16, 1951 it is manifest that the parties intended to rehabilitate Cassady and place it in a position to go forward with this construction work and complete its contract with Felt. The agreement had no other purpose. An extension of time was granted

Cassady for performance; an adjustment was made in the types of homes to be built by it, and payment therefor, and Prudential was freed from limitations on disbursement of the veteran-mortgagors' funds by vesting in Prudential a discretion in making disbursement of the funds. (The veteran-mortgagors gave their consent to this arrangement (R. 39, R. 105) These provisions were to aid Cassady in the performance of its agreement. Cassady knew that the funds it had been paid by Associated Accountants were proceeds of veterans' mortgages and by agreeing that it had received from Felt and Associated Accountants an accounting of these funds, it also agreed it has received all "available funds" to date of the agreement. Cassady therefore foreclosed its right to question the amount of payments it had received. It knew that the only funds to which it was entitled were the "available" funds arising from veterans' loans and when it agreed that Felt and Associated Accountants had made accounting to it for these funds "and confirmed and approved all of the disbursements made by Associated Accountants to the date of the agreement", it in fact agreed that it had received all payments due it to February 16, 1951. This amounted to broad approval and exculpation by Cassady of all that occurred before. By its own acts in prematurely entering upon the construction work, it had made impossible com-

pliance with the "course of construction" formula by Felt, and by the Agreement of February 16, 1951, Cassady admitted that notwithstanding a variance in the times of payment (caused by its own voluntary acts) it had received all that was due it from Felt to February 16, 1951.

3. *Hartford is bound by the terms of the Agreement of February 16, 1951. (Ex. PR 6)*

An important provision (called hereinafter "open door" provision) of the bond (Ex. PR 1) which is the subject of this action reads as follows:

"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 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, extension, or forbearance being hereby waived.*" (Italics supplied) (Paragraph 6 of the Bond)

There is no question in this case that the cost of any changes or alterations were less than 10%

of the contract price. (Finding 30; R. 262) Cassady only *claimed* that there was due it between forty-four and fifty thousand dollars by way of *damages* and “extras,” and the trial court denied that recovery. (R. 262) C. J. Cassady in his testimony (R. 240-245) itemized the amount of Cassady’s claim for “extras” and *damages* and totaled the same in the amount of \$51,850.70 — an amount well under 10% of the original contract price of \$763,000.00 (Ex. PR 2). Therefore, the above quoted provision of the bond became fully operative and by it *Cassady and Felt were at liberty to make any changes or alterations in the contract which they elected to make without consent of or notice to Hartford*. The Court in its opinion in the case wrote:

“The trial court found that Hartford did become a party to the supplemental contract by giving its approval to the modifications of the portion of the original contract which it desired to have modified without expressly limiting its agreement to the other parts of the supplemental agreement.”

The trial court found that the Supplemental Agreement of February 16, 1951 (Ex PR 6) was presented to Hartford and it gained full knowledge thereof and that by endorsement it consented to amendment of certain provisions of the contract of July 19, 1950 and of August 22, 1950 (Finding 17). The trial court concluded as a matter of law that:

“8. Cassady irrevocably compromised and settled all claims for breach of contract or otherwise against Syndicate and Prudential or either of them arising prior to February 16, 1951 by the Supplemental Agreement of February 16, 1951 and is estopped and foreclosed from asserting same and Hartford was informed and had complete knowledge of Cassady’s actions in this respect.”

The Court in making the statement quoted above from its opinion (Page 16 of this brief) was entirely correct. Paragraph 6 of the bond set forth in full above, authorized Cassady to act for Hartford in Negotiating and executing the Supplemental Agreement of February 16, 1951 (Ex PR 6) inasmuch as there was no increase in cost exceeding 10% of the “original contract price.” When the Supplemental Agreement was presented to Hartford, it gave its affirmative consent to certain provisions of the contract, *but it did not disavow the other provisions of the Supplemental Agreement. They became fully operative against Hartford because the bond itself (Par. 6, supra) specifically declared that “any alteration which may be made in the terms of the contract, or the work to be done under it * * * shall not in any way release Surety or Principal of the obligations of this instrument * * * .”*

It appears to be clear beyond argument that (a) Cassady by the Supplemental Agreement of February 16, 1951 (Ex. PR 6) waived all claims for

breach of contract by Felt prior to that date (if any existed) and (b) by virtue of paragraph 6 of the bond Hartford is bound by such action on the part of Cassady. Hartford, when the Supplemental Agreement was presented to it, had the opportunity of refusing to be a party to such arrangement; *it did not*. The court, therefore, was wholly justified in its statement above quoted.

4. *Hartford must assume full responsibility for Cassady's premature commencement of work on the project and in assuming a "calculated risk" that funds would be disbursed according to the "course of construction" provisions of the contract.*

The witness, Scott, gave some illuminating evidence, which stands uncontradicted, concerning Cassady's premature commencement of work on the Morningside Heights project:

"Q. Did you give the instructions to commence work on construction early in June? What were the circumstances of the construction? (R. 323)

A. Of the start of construction? (R. 324)

Q. Yes.

A. Well, it was a rather confused circumstances at the time. Mr. Cassady was having quite a bit of trouble making his bond, and he had sent to Los Angeles for help on that situation, and things in general looked like they had reached a stand still, so Mr. Ross

was in a hurry. He had gone to the expense of buying steel forms for this project.

Q. Now, what was Ross' function?

A. He was the fellow that put in the cement foundations, done the excavating and back filling. He had purchased these three sets of steel forms at about — cost of about ten or twelve thousand dollars, and he was in a hurry, so it was agreed to start ten or twelve houses.

Q. When you say "it was agreed", who agreed?

A. Everybody concerned; Mr. Ross, Mr. Snyder, Mr. Cassady. The conference was held in George Snyder's office.

Q. And that was when, late in May 1950?

A. Yes, that was in May.

Q. And that was done consciously with a realization that financing had not been completed?

Mr. Christensen: I object to that as leading and suggestive, calling for a conclusion.

The Court: It seems to be leading.

Q. Well, you knew at that time that no mortgages had been executed and delivered.

A. Yes.

Mr. Christensen: Same objection.

Q. You knew that.

The Court: The answer may stand (R. 324)

* * * *

Q. What was said at that conference, Mr. Scott? (R. 325)

Mr. Christensen: Now wait a minute, I would like to know who was present at that conference.

A. All right, C. P. Cassady, C. J. Cassady, George Snyder, Mr. Ross and myself.

Mr. Christensen: Anyone representing the Hartford Accident and Indemnity Company so far as you know?

A. No. (R. 325)

Mr. Christensen: I will object to it as hearsay.

The Court: The objection is overruled. I will hear. While you may not be bound individually for anything, still you may be liable under your contract if your insured is bound.

Mr. Riter: I think the question is good.

The Court: I will let him answer.

Q. All right, now, have you any recollection — and if you haven't any recollection, simply say so — as to what you said to the Cassadys or what Mr. George Snyder said to the Cassadys (R. 325), or Mr. Ross said to the Cassadys with respect to commencing work on the project at the meeting? (R. 326)

A. Well, it would be rather hard for me to recall exactly what was said there.

Q. Can you give the substance of it?

A. Well, the substance of the meeting was that we went to work.

Q. Was anything discussed about the fact that no mortgages were recorded?

A. Yes, there was some discussion on that, and that was prompted by a situation that had arisen in the immediate past, and that was the subject of Mr. Cassady's financial position. I'm not — at the time this bond was applied for, a financial statement was submitted, and the amount of cash shown on that statement was very inadequate for the undertaking of a project this size. Therefore, Mr. Cassady obtained help on this situation.

Q. That help was from Mr. Peter Shelby?

A. Yes, and that financial situation was discussed and the conclusion was that between Mr. Shelby and Mr. Cassady they had adequate financial strength to undertake this project. (R. 326)

Q. And obtain a bond?

A. And go ahead with the construction because the way the sales were — the sale were very good. They were exceptionally fine. *And it was a conclusion of all present that the sales program would not lag too far behind and it was a calculated thing that we could*

Q. *You took a calculated risk on it?*

A. Yes.

Q. *And the two Cassadys participated in that?*

A. *Definitely.* (R 326)

* * * *

Q. But will you give the substance of that conference?

A. Well, it was as I have stated before,

the conclusions were to go ahead. Mr. Cassady Sr. and Jr. felt they were adequately financed now to undertake the construction.

Q. But the bond had not been issued yet?

A. I couldn't say for sure whether the bond had been issued then — or I am quite — it had (R. 327)

* * * *

Q. Well, I am going to help you out and get the date of the bond and will ask you . . . the bond bears date July 21, 1950. Was it prior or after that date that this conference was held?

A. It was prior to that date.

Q. The latter part of May?

A. Yes. (R. 327) (*Italics supplied*).

(Special Note: The rulings of the trial court set forth above, on Appellant's objections were correct. By virtue of Paragraph 6 of the Bond, Hartford was represented at that conference. Cassady represented Hartford).

Upon cross-examination of the witness, Scott, he further elucidated this "calculated risk" thus:

"Q. And you used the expression "took a calculated risk". As a matter of fact everybody at the meeting took a calculated risk, didn't they?

A. Well in any building project, you take a calculated risk going in at any time, regardless of what the circumstances are.

Q. *I mean by reason of the fact that*

they were going ahead prematurely, as you put it. In other words there weren't any contracts signed yet. There wasn't a bond yet but everybody was a little fidgety. They jumped in, and everybody knew they were taking a chance? (R. 332)

A. *In analyzing that situation as it was, and coming out with a very considered conclusion to start construction work, the conclusions supporting that act would have had to have been substantial enough to convince everybody there that the start should have been made.*

Q. *Well, Mr. Scott, I'm not quarreling with the wisdom of the decision. All I am saying that everybody knew they were taking a chance.*

A. *I don't believe Felt figured they were taking a calculated risk in this respect * * *."*
(R. 333)

* * * *

Q. In any event, all of the factors that went into the decision were brought up for consideration and attention at that meeting, and discussed?

A. All the problems that we could anticipate were discussed." (R. 333) (Italics supplied)

Hartford deliberately executed and delivered the bond (Ex PR 1) containing paragraph 6, supra. By including this provision in the bond, it opened the door to and assumed responsibility for exactly the kind of transaction as that which occurred be-

tween Felt and Cassady with respect to commencement of work on the project. It authorized Cassady, as its representative in connection with the bond, to alter the terms of the construction contract in any manner or degree so long as such alteration did not increase the contract cost more than 10%. In this connection the testimony of Mr. A. L. Blackburn, Hartford's representative in negotiation of the bond is interesting.

“Q. I take it that as a careful bonding executive you had familiarized yourself with the details of the project that was to be completed in Utah?

A. Yes.

Q. You had become familiar generally with the contracting parties and the basic contract that you were to bond?

A. I was acquainted only with Cassady.” (R. 414, 415)

The actual construction work on the project commenced prior to June 22, 1950 and at that time Cassady knew that the channel through which the required funds must flow had not been opened, and would not be opened until sale of the houses to veterans had been consummated, and veterans mortgages negotiated, executed and recorded. (Findings 12 and 29) While the contract of July 19, 1950 (Ex PR 2) and the bond in question (Ex PR 1) had not been executed, the terms of the contract had vir-

tually been agreed upon (R. 329) at the time of the May conference concerning which the witness Scott, testified at length. The important aspect of this situation is that it carried over into the contract of July 19, 1950 after it was actually signed, and the bond issued by Hartford. Cassady, by its own action had made impossible the regular performance by Felt of the provisions of the contract calling for the "course of construction" payments.

"If the impossibility of performance arises directly or even indirectly from the acts of the promisee, it is a sufficient excuse for non-performance. This is upon the principle that he who prevents a thing may not avail himself of the non-performance which he has occasioned. Non-performance of a promise in accordance with its terms is excused if performance is prevented by the conduct of the adverse party." (12 Am. Jur. Contracts, Sec. 381, pg. 958; *Bewick v. Mecham*, 26 Cal. App. (2d) 92, 156 Pac (2d) 757; *Empson Packing Co. v. Clawson*, 43 Colo. 188, 95 Pac 549; *Chilton v. Oklahoma Tire and Supply Co.*, 180 Okla. 39, 67 Pac. (2d) 27.)

Cassady is prevented from asserting that Felt violated the "course of construction" provision of the contract, because of its own deliberate action in commencing work on the project with full knowledge of the result if funds were not available. Hartford through the "open door" provision of the bond (Paragraph 6) is bound by Cassady's action and

must bear the responsibility for the debacle which followed.

POINT II

THE DETERMINATION THAT FELT DID NOT COMMIT ANY SUBSTANTIAL VIOLATIONS OF ITS CONTRACTS WITH CASSADY MADE IT UNNECESSARY FOR THE COURT TO CONSIDER THE EFFECT OF THE "ESCAPE PARAGRAPH" OF THE BOND QUOTED BY APPELLANT IN POINTS II AND III OF ITS PETITION FOR REHEARING.

1. *The fact that Felt did not violate its contracts with Cassady in any substantial manner deprives Hartford of any defense to Prudential's claim on the bond.*

Respondent respectfully invites the court's attention to the following quotation from page 63 of its original appeal brief:

"For the purpose of this discussion, let it be assumed that Felt was guilty of substantial violations of the Felt-Cassady contract of July 19, 1950 (Ex PR 2) in the particulars alleged and claimed by Hartford."

Respondent in its brief then proceeded to discuss the question as to whether Felt's breaches of contract were imputable to Prudential under the terms of the bond. *Respondent submitted its argument on the hypothetical basis that if Felt substantially breached the contracts with Cassady then such fact did not bar Prudential's recovery on the bond.* The

trial court by its Finding 39 determined that Felt “did not breach its contractual obligations to Cassady in any substantial manner”. This Finding shut off Hartford’s principal defense; hence there was no fault of Felt to impute to Prudential. In Point I of this answer and brief, respondent sincerely believes that it has demonstrated that the trial court’s Finding 39 is fully sustained by the evidence in this case and determines all of the issues in respondent’s favor. There is no necessity for the court considering the “escape paragraph” of the bond, nor to enter into a discussion as to its consequences.

2. *Even if Felt were guilty of substantial violations of contracts with Cassady, such violations cannot be imputed to Prudential so as to bar its recovery on the bond.*

Under Points VI, VIII, and IX of Respondent’s original appeal brief is fully discussed the interpretation of the “escape paragraph” and the construction and interpretation of the bond which Respondent now reasserts and affirms. It is submitted that such discussion answers Appellant’s contentions set forth in Point II and Point III of its Petition for Rehearing and it is unnecessary to repeat same. Respondent submits that it had demonstrated that even if such substantial violations on Felt’s part existed that they cannot be imputed to Prudential.

CONCLUSION

1. Respondent invites the court's attention to some extraordinary conditions in connection with the form of the bond. (PR 1) In the first place, the bond recognizes the existence of three obligees, Prudential, the LENDER OBLIGEE; Pacific, the TITLE OBLIGEE; and Felt, the OWNER OBLIGEE. This fact alone must have informed Hartford of unusual circumstances in connection with the Morningside Heights project. Secondly, the naming of another insurance company, Pacific, as TITLE OBLIGEE, proclaimed that something had occurred involving the priority of the liens of the Prudential mortgages. It does not lie with Hartford, in view of the form of the bond, to deny that it had knowledge when it executed and delivered the bond that claims had already accrued through prematurity of commencement of the work.

2. The court in its opinion correctly determined that Prudential is entitled to recover on the bond the damages which it has admittedly suffered. The Petition for Rehearing should be denied.

Respectfully submitted,

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