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Geneva Lumber Co. v. Payne and Day, Inc. : Brief of Respondent on Appeal

Utah Supreme Court

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**In the Supreme Court of the
State of Utah**

FILED

APR 3 - 1959

GENEVA LUMBER COMPANY,

Appellant,

Supreme Court, Utah

vs.

PAYNE AND DAY, INC.,
a corporation,

Respondent.

CASE

NO. 9075

RESPONDENT'S BRIEF ON APPEAL

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NEW GERRITSEN PRINTING CO. - PAYS, UTAH

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In the Supreme Court of the State of Utah

GENEVA LUMBER COMPANY,
Appellant,

vs.

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a corporation,

Respondent.

CASE
NO. 9075

RESPONDENT'S BRIEF ON APPEAL

STATEMENT OF FACTS

Plaintiff brought suit against defendant on an open account, or in the alternative on a "Quantum Meruit", seeking recovery of \$7,294.61 claimed to be unpaid for materials delivered. At the conclusion of a six day trial, the Honorable Joseph E. Nelson, Judge of the Fourth District Court of Utah County, granted defendant's motion to dismiss, and this appeal was taken from the order of dismissal. The parties shall be hereinafter referred to as appellant and respondent.

Because appellant, in his brief, made but a partial statement of facts, it will be necessary for us to here make a supplementary statement to complete from the record the evidentiary facts upon which appellant has remained silent. We agree that on this appeal that the rule of law applicable is, as stated by Justice Worthen in *Williams vs, ZCMI*, 6 Utah 2d 283 at Page 285: "We must view the testimony in the light most favorable to plaintiff in determining the correctness of the judgment of dismissal at the end of plaintiff's case". However, we believe the rule is applicable to all appellant's evidence, and not just selected parts of same. Let us proceed to a complete statement of the facts involved.

The appellant, Payne and Day, a Utah Corporation, during the year 1957 contracted for the construction of sixty-one homes in the Orem-Provo area for sale to interested buyers. The homes were built successively in five different groups beginning with a group of ten homes in Rose Garden Subdivision at Orem, and when that was completed, the remaining four groups of homes were constructed in Mount Aire Subdivision, Provo. Respondent employed C. E. Slavens as construction superintendent under separate contracts covering each group of homes in which his duties, authority and compensation were specifically defined, (Exhibits 20, 21, 22). The construction superintendent procured bids from subcontractors on the labor and materials necessary for the construction of each home in each group, presented same to the respondent and same were accepted by it. Respondent then attached the bid to a written agreement of which it was made a part, one for concrete flat work labor and material, (Exhibit 24), one for framing labor through F.H.A. second inspection, (Exhibit 25), one for roofing labor and materials, (Exhibits 26 and 27), and one

for two packages of building materials in connection with each group of homes, (Exhibits 6 through 11). In all of these contracts on each group of homes, the parties fixed a single unit home price and respondent inserted in each the following provision:

"It is mutually agreed that any additions or deletions in the materials to be furnished are to be given in writing by party of second part (the corporation) to the first party, and the value of the change, based upon prices quoted in the attached list, shall either be added or subtracted from the original contract."

We have quoted the provision from the contract between respondent and appellant, Geneva Lumber Company because we are concerned on this appeal only with those contracts.

Respondent entered into five separate contracts on the five groups of homes in question, the first is dated February 21, 1957, and it covered ten homes in Rose Garden Subdivision, Orem, (Exhibit 6), the next is dated March 16, 1957, and it covered eleven homes in Mount Aire Subdivision, Provo, (Exhibit 10), the next was made June 3, 1957, and it covered sixteen homes in Mount Aire Subdivision, Provo, (Exhibit 8), the next is dated July 26, 1957, and it covered eleven homes in Mount Aire Subdivision, Provo, (Exhibit 7), and one dated September 3, 1957, covering twelve homes in the Mount Aire Subdivision, Provo, (Exhibit 9). There was also a contract between the same parties dated September 23, 1957, covering one home in the Western Manor Subdivision, Orem, (Exhibit 11). These contracts all incorporated appellant's bids for furnishing all materials necessary for the construction of each home unit through first and second F.H.A. inspections. With the

exception of the designation of the group of homes covered, these contracts contained substantially identical provisions and for that reason we will refer to appellant's Exhibit 6 to illustrate the contract provisions.

Exhibit 6 covers the Rose Garden group of homes at Orem. It provides that appellant shall furnish materials for plan No. 485, Schemes 1, 2, and 3, as per "attached lists", which become a part of the agreement "for the price of \$2,116.00". It required the specified grade and quality indicated by the list and delivery within 15 days after being ordered by the respondent. The attached lists are entitled "Building Material List for Three Bedroom House-Garage plan with gabled front porch plan 485, Package No. 1-Schemes 1, 2, 3." This list then specifies in detail the number of units and the kinds and quality of materials necessary to complete the package and prices out each unit and shows a package number 1 total net price of \$1610.00. Then follows a list similarly titled for "package No. 2, schedules 1, 2, and 3," likewise detailing the materials and showing the net price for package No. 2 of \$506.00. The contract then provides for the above quoted writing in case there are any additions or deletions in the list. It is further provided that materials shall be stacked on the jobsite in good order and in accordance with the superintendent's instructions; that the contract price shall hold for ninety days at which time adjustments shall be made in accordance with current market prices; that respondent will purchase the material at the named price as needed; that payment for materials delivered is to be made on the 10th of the month following delivery to the 27th of the preceding month; "that delivery will be made and billed by package number as per attached list"; and the agreement covers the ten houses in Rose Gar-

den Subdivision. The houses described in this contract were built and the parties fully performed their agreement.

On March 28, 1957, appellant, Geneva Lumber Company, billed respondent for materials furnished as called for in package No. 1 under the contract, Exhibit 6, which comprised the framing materials taking each house up to first F.H.A. inspection. A receipt dated April 10, 1957, for \$16,100.00 was thereupon given by appellant to respondent in payment for the materials in package 1, (Exhibit 12). Also, on April 10, 1957, appellant executed and delivered to respondent a receipt on each home unit described in Exhibit 6 for the sum of \$1610.00 reciting that it was "In full payment for materials furnished" as required by package 1 of Exhibit 6. Likewise on April 27, 1957, appellant billed respondent for materials furnished in package No. 2 on each house unit described in Exhibit 6 and on May 10, 1957, gave a separate receipt and lien waiver acknowledging payment in full for each unit package No. 2 materials as required by the contract, Exhibit 6, (Exhibit 12; Tr. 90-93). Identical contracts were made between these same parties on each of the other groups of homes (Exhibits 7, 8, 9, 10, and 11) pursuant to which appellant furnished the materials called for by package 1 and package 2 for each unit and gave receipts in full on each home unit for all materials furnished for same, as well as lien waivers thereon. (Exhibits 13 A and B, 14 A, B, and C, 15 A, B, and C, 16 A, B, C and D).

Three months after the date of the last contract (appellant's Exhibit 11) and after all of the contracts had been fully performed, including those of the general superintendent, C. E. Slavens, respondent corporation received a communication from Slavens (Exhibit 31) dated January 27,

1958, enclosing a statement from appellant for "extras on the 73 homes" in the amount of \$8398.30, and which included documents in the nature of itemized statements, in which Slavens stated "I need not say that the entire bill is utterly ridiculous". Although the appellant did not send this statement directly to the respondent, but rather, sent same to Slavens, who no longer was employed by respondent and was then in Blanding, Utah, and this was the first notice respondent had been given that appellant was making claim for extras under the contracts in question, (Tr. 101-102). Appellant, John Davis, admitted on cross examination, that he was well aware of the contract provision (Tr. 339-340) requiring a "writing if there were any additions or deletions", and that he tried to get respondent on the telephone for the purpose of procuring the writing but was unable to do so, (Tr. 337-339). He also admitted that no writing was procured from the respondent authorizing any of the additions of materials which he claims to have furnished. Slavens denied that he ever told appellant that the required writing would not be necessary, (Tr. 418). Slavens did admit receiving, on or about July 1, 1957, a statement from appellant, (Exhibit 19) for \$623.36 for extras on "Cherry Lane Project, (Tr. 419), and that he talked to appellant, John Davis' wife and she told him it was sent out by mistake, (Tr. 440). The original complaint was filed on May 28, 1958, and the amount of appellant's claim stated therein is \$8,398.30, but after the taking of the depositions of Slavens and respondent in July of 1958, he filed the amended complaint reducing the amount of the claim to \$7,294.61, (Tr. 370-371). We point this out to show the nebulous character of appellant's claim, which was apparently confusing to appellant himself, (Tr. 419-420).

Appellant offered, as evidence of his claimed extras allegedly furnished respondent in the construction of the five groups of homes, three paper-back books, (Exhibits 1, 2 and 3) containing numerous undated entries of materials claimed to have been furnished as "additions" to the lists attached to the contracts, (Exhibits 6, 7, 8, 9, 10 and 11). The tabs attached to Exhibits 1, 2, and 3, the red penciling and the crosses appearing therein were added by the witnesses who identified same. Respondent made timely objections to Exhibits 1, 2 and 3, and all oral evidence going to the identification and explanation of same, and also to appellant's Exhibits 4 and 5, summarizing the reasoning process employed by the witnesses, making conclusions from the entries in the three books as to prices and materials. Respondent's objection to this evidence was made on the ground that its admission would be a violation of the parol evidence rule in view of the "additions and deletions" provision contained in the contracts in question, and on the further ground that the evidence was self-serving and immaterial, (Tr. 288). The court admitted this evidence "for what it is worth", (Tr. 40).

Appellant used the date of the making of the contracts 6 through 11 respectively, to fix the time when the alleged extras were furnished and thus ties Exhibit 1, 2, 3, 4 and 5 directly into the contracts mentioned, (Tr. 38). Thus, the appellant dates the alleged delivery of materials by reasoning that this nebulous mass must have been furnished at the very time appellant was furnishing materials under the above mentioned contracts, and in violation of the "additions" provision of same.

Appellant claimed that respondent's construction superintendent, C. E. Slavens, authorized the appellant to fur-

nish the claimed extras appearing in Exhibits 1, 2, and 3, (Tr. 8-9-20), but there is no evidence in the record that Slavens had any such authority, either express or implied. Numerous attempts were made by appellant to prove Slavens' authority by some statement he was alleged to have made. The court, however, sustained our objection to this kind of evidence on the ground that agency cannot be proved by oral statements of the alleged agent, (Tr. 143-144; 162-163). The authority of Slavens to bind respondent is shown by the contracts under which he was employed. In fact, respondent required a contract with each of the persons who had any part in the construction of the homes in question, whether it be for the flat concrete work, the roofing, the construction labor, or the furnishing of materials. In each such case, respondent protected itself as far as "additions and deletions" were concerned by the above quoted contractual provision appearing in each contract.

We believe that under the foregoing facts, viewed in a light most favorable to appellant, the provisions of the contracts covering the construction of the 61 homes in question, and particularly that provision in each pertaining to the requirement of a writing from respondent in the event that "additions and deletions" were made, and the law applicable to the situation here, the court properly and correctly granted respondent's motion to dismiss at the close of appellant's case.

The contracts for the construction of the homes in question (Exhibits 6 through 11) provided for the furnishing of materials referred to in each contract as package 1 and package 2. The court properly received evidence as to the meaning of these package provisions. Slavens was experienced in this "package method" of construction and

was qualified to explain the "package" bids which appellant was called upon to make to the respondent. The package 1 lists attached to each contract called for the framing materials necessary to construct the individual home units to the point of the first F.H.A. inspection, and package 2 lists called for materials sufficient to take same to second F.H.A. inspection. Slavens explained that in each package there was a 10% mark-up leway, that is to say, 10% more materials were specified in the lists than were actually needed in the construction, (Tr. 392-390). Slavens further testified that the lists could not be absolutely accurate in specifying the exact amount of materials that would be required to carry the construction to the first and second inspection of F.H.A., and hence the said 10% leeway provided against possible shortages. Under the package method employed in these contracts the appellant delivered the necessary materials to the jobsite and there was always materials left over upon completion of each of the five projects, (Tr. 93-100; 405-407). Respondent never claimed credit for the overages, although they were substantial in each case, because appellant owned the overages which resulted in this way. Upon completion of each job under each contract, the appellant caused the materials left over to be inventoried and subtracted from the next succeeding project. This was true upon completion of Rose Garden, and the four succeeding groups of homes at Mount Aire and in each instance the appellant took credit for substantial amounts of materials which were not used in the preceding project.

Our position with respect to appellant's argument in his brief, and for the affirmance of the judgment, follows.

STATEMENT OF POINTS**POINT I**

THERE IS NO EVIDENCE OF ANY CONDUCT ON THE PART OF RESPONDENT UPON WHICH COULD BE BASED "WAIVER" OR "ESTOPPEL" OF THE CONTRACTUAL REQUIREMENT THAT "ADDITIONS AND DELETIONS" IN MATERIALS TO BE FURNISHED WERE TO BE AUTHORIZED IN WRITING BY RESPONDENT, AND THE PROFERRED EVIDENCE ON THIS POINT VIOLATES THE PAROL EVIDENCE RULE.

POINT II

RESPONDENT'S CONSTRUCTION SUPERINTENDENT, C. E. SLAVENS, HAD NEITHER ACTUAL NOR APPARENT AUTHORITY TO ALTER ANY PROVISION OF RESPONDENT'S CONTRACTS WITH APPELLANT, AND PARTICULARLY THE PROVISION WITH RESPECT TO "ADDITIONS OR DELETIONS".

POINT III

THE PAROL EVIDENCE RULE WAS NOT VIOLATED BY RESPONDENT SHOWING THE MEANING OF THE PACKAGE METHOD OF FURNISHING MATERIALS AS PROVIDED IN THE ORIGINAL CONTRACTS.

POINT IV

THE BILLINGS, THE PAYMENTS, THE RECEIPTS IN FULL AND LIEN WAIVERS WERE ALL MADE BY THE "PACKAGE" AS REQUIRED BY THE CONTRACTS, AND THERE WAS NO NEED FOR APPELLANT TO EXPLAIN ANY OF THESE DOCUMENTS.

ARGUMENT

POINT I

THERE IS NO EVIDENCE OF ANY CONDUCT ON THE PART OF RESPONDENT UPON WHICH COULD BE BASED "WAIVER" OR "ESTOPPEL" OF THE CONTRACTUAL REQUIREMENT THAT "ADDITIONS AND DELETIONS" IN MATERIALS TO BE FURNISHED WERE TO BE AUTHORIZED IN WRITING BY RESPONDENT, AND THE PROFERRED EVIDENCE ON THIS POINT VIOLATES THE PAROL EVIDENCE RULE.

Appellant's argument under Point I of his brief proceeds upon the assumption that respondent's construction superintendent, Slavens, had authority to waive the contractual provision requiring a writing from respondent in the event of "additions and deletions" of materials under the contracts. We believe that no such assumption is warranted under the evidence in this case. We do not quarrel with the point of law cited under Point I in appellant's brief. We assert, however, that there is no fact appearing in this record to which the rule can be applied. Appellant relies on the oral statement which he claims Slavens made at Geneva's office in July of 1957, denied by Slavens, about keeping a separate record of the claimed extras and keeping it secret from respondent. It is argued that this amounted to appellant and respondent entering into an oral agreement to waive the writing requirement provision for extras contained in the said contracts. Also, appellant apparently seeks to have the principle of estoppel apply because when he says he attempted to get in touch with respondent, he was unable to do so. At least, appellant admits that he

knew well what the provision concerning additions and deletions was, and that it was necessary to get in touch with the respondent corporate officers and procure a writing in the event extras were necessary. However, an agent's authority cannot be shown by a reliance on oral declaration the agent is supposed to have made. The applicable rule as stated in A.L.I. Restatement: Agency, Section 285 is as follows:

"Evidence of a statement by an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent, unless it appears by other evidence that the making of such statement was within the authority of the agent or, as to persons dealing with the agent, within the apparent authority or other power of the agent."

See also 2 American Jurisprudence, Section 445; and 3 A.L.R. 2d 602 where it is said:

"In cases too numerous to be exhaustively collected the proposition has been announced that, as against the principal, evidence of extrajudicial statements of an alleged agent is not admissible to show the fact of agency or the extent or scope thereof."

It is upon such oral declarations that appellant relies and under the law such reliance cannot be had. It is appellant, rather, who should be estopped to assert such a flimsy claim as he is making upon the ground that he at all times relied upon the contracts, billed respondent at the conclusion of each and was paid according to the billing and receipted respondent for full payment of all of the materials furnished under all of the said contracts. Appellant seems to have conspired with Slavens to keep secret what was going on concerning the claimed extras all during the period

from February 1957 until November of 1957, when all of these contracts were being performed, and then some three months later made claim that he had furnished extras despite the "additions and deletions" provisions of said contracts.

All through the trial it was respondent's position that appellant's attempt to adduce oral evidence concerning his claimed extras, was a violation of the parol evidence rule because it was an attempt to vary the terms of the written contract. Apparently the trial court, at the close of the trial, reached the conclusion that this was what appellant was attempting to do. The rule on which we relied is stated in 3 Jones Commentaries on Evidence, Section 1484 as follows:

"All conversations and parol agreements between the parties prior to a written agreement are so merged therein that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement."

In the "Model Code of Evidence" of the "American Law Institute" Dean Mason Lad, commenting on the code at page 355, states that:

"In its brief space, it covers all of the law of evidence except parol evidence rule, which is regarded as a rule of substitutive law rather than as a rule of evidence."

The practical importance of the application of the rule in written contract like the one in the case at bar is stated in *Jenkins Used Cars vs. Rice* (1958) 7 Utah 2d, 276, 277, 323 P. 2d 259, by this Court as follows:

"But it is also elementary and of extreme practical importance that we hold contracting parties to their clear and understandable language deliberately committed to writing and endorsed by them as signatories thereto. Were this not so business, one with another among our citizens, would be relegated to the chaotic, and the basic purpose of the law to supply enforceable rules of conduct for the maintenance and improvement of an orderly society's welfare and progress would find itself impotent. It is not unreasonable to hold one responsible for language which he himself espouses. Such language is the only implement he gives us to fashion a determination as to the intentions of the parties. Under such circumstances we should not be required to embosom any request that we ignore that very language. This is as it should be. The rule excluding matters outside the four corners of a clear, understandable document, is a fair one, and one's contentions concerning his intent should extend no further than his own clear expressions."

The respondent corporation was in a large building enterprise and the corporate officers did not have direct supervision of the work. For that reason it employed a construction superintendent and gave him supervisory authority only. Respondent also made separate contracts with all the other subcontractors who participated in any way in the construction, among which appellant had the written contracts for furnishing materials under the package method of contracting. Respondent had a right to protect itself from claims for extras and did so by inserting in each contract the provision with respect to "additions and deletions". We do not think appellant can arrange with anyone to circumvent such written provision requiring written authority for the furnishing of any extras, rely

upon the contracts, receive payment and receipt in full for materials furnished under same and then after complete performance for the first time make these surprise claims that extras had been furnished. We believe the evidence shows the claim is wholly without merit, and that the court rightly granted our motion to dismiss at close of appellant's case.

POINT II

RESPONDENT'S CONSTRUCTION SUPERINTENDENT, C. E. SLAVENS, HAD NEITHER ACTUAL NOR APPARENT AUTHORITY TO ALTER ANY PROVISION OF RESPONDENT'S CONTRACTS WITH APPELLANT, AND PARTICULARLY THE PROVISION WITH RESPECT TO "ADDITIONS OR DELETIONS".

In his Point II, appellant claims that Slavens had actual or apparent authority to change the provisions of the contract in question. He cites the record (Tr. 299) showing alleged statements by Slavens that he had authority to do so. Appellant then complains that the trial court committed error in ordering such alleged oral statements stricken from the record on the grounds that the extent of an agent's authority cannot be shown by his voluntary declarations. He claims these statements were admissible as part of the *res gestae* and cites authorities on pages 14 and 15 of his brief to sustain this position. An examination of these authorities show conclusively that they do not apply and do not sustain appellant's position in that regard. For example, he cites A.L.I. Restatement: Agency Section 284, which is as follows:

"In actions between the principal and third persons, evidence of a statement by an agent is admissible for or

against either party for the purpose of proving that such statement was made, if the fact that the statement was made constitutes, or is relevant in the proof of, one of the ultimate facts required to be established in order to maintain a cause of action or defense."

It is apparent that this rule of law applies where it is a matter between **"principal and third persons"** and not as in the instant case, between the parties to the written contract itself. The case of *Park vs. Moorman Mfg. Co.*, 121 Utah 311, 241 Pac. 2d 914, (cited App. Br. 14) involved the authority of an agent to make a warranty binding upon his principal in dealing with a third party. It was held that the agent from whom the authority came was the general sales agent of the company and had authority to make the representation to a third party from whom he was soliciting business. Also the *Union Century Life Assurance vs. Glascock*, 110 SW 2d 681, 270 KY. 750, 114 A.L.R. 373, also involved statements made by the agent to a third party and not to one of the parties to a written agreement, as in the case at bar. We believe that an examination of these cases shows that appellant has misconceived the applicable law here, for all of the authorities cited apply to the third party situation.

The record shows that respondent hired Slavens under a written contract to supervise the construction of the building project. In all of the contracts made by respondent for the labor and materials that went into the construction, it provided that a writing was required in the event there were "additions or deletions" needed. Although appellant well knew of this provision, he proceeded in the teeth of it, to secretly make some claimed deal about extras with Slavens in which Slavens is alleged to have made the alleged state-

ments about his authority. The farthest appellant seems to have gone to procure the required writing, according to his own testimony, was to make an attempt to get in touch with respondent and which he never really accomplished.

Exhibit 19, dated July 1, 1957, was never sent to respondent and no such claim was ever disclosed to respondent during construction. All of the contracts in question made it clear to Slavens and the appellant, as well as of all the subcontractors, that if any extra materials or labor were needed, authority to put them into the project had to be procured from respondent in writing. This is not a case where respondent's construction superintendent was making representation about his authority to some third party to procure materials. The most that can be made out of appellant's claim is, if the same were taken to be true, that he secretly furnished Slavens materials which he calls extras without ever contacting respondent at any time during the existence of the contracts in question. However, appellant relied upon and tied his claimed extras into each one of the contracts in question, accepting payments and receipting same in full, and several months after such complete performance, he asserts a claim for extras. Significantly, he did not send the claim to the respondent, but rather mailed it to Slavens, who had completed his contract and was working in Monticello, Utah. He wants us to believe that respondent indulged in some conduct from which it can be inferred that Slavens had actual or apparent authority to do what appellant claims he did. We submit that the statements made by Slavens in his letter of January 27, 1958, attached to Exhibit 31, correctly reflects the situation when he said "I need not say that the entire bill is utterly ridiculous". We submit that the trial court

made no error in excluding the proffered oral declaration of an agent whose authority was limited by all of the contracts in question and his order doing so should be sustained.

POINT III

THE PAROL EVIDENCE RULE WAS NOT VIOLATED BY RESPONDENT SHOWING THE MEANING OF THE PACKAGE METHOD OF FURNISHING MATERIALS AS PROVIDED IN THE ORIGINAL CONTRACTS.

In this particular, appellant claims in his brief, that because Slavens was permitted to explain a term contained in the contracts in question and show from his experience the meaning of the "package method" of building, the parol evidence rule was violated. It is our position that this is not so because explanation of contract terms can be made without any violation of the rule. As is stated in A.L.I. Restatement: Contracts, Section 230:

"The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean."

See *ibid* Section 228 as to integration being writing.

See also 20 American Jurisprudence 994, Section 1142.

Each of the contracts in question called for materials for each home unit by "packages". Appellant's claim for

extras involved the interpretation or meaning of the term "package". Indeed, appellant first raised the question on direct examination of Slavens (Tr. 225-226) where counsel had him testify that the specified materials in the "packages" called for materials in excess of the amount required to complete the package. This examination by counsel is as follows:

(By Mr. Sorensen)

Q. "Do you know how Art Riley would understand how to get the hinges if they were not on the package list?

A. Yes

Q. How would he know that?

A. Because he needed them.

Q. Needed them and therefore he knew it; is that your testimony today?

A. They knew the material on the package,

Q. How did they know that?

A. Because of the package system of buying.

Q. What about the materials that were not on the package?

A. That was taken care of by the fact there were overages of material.

Q. Show me any overages of material in the contract, Mr. Slavens.

A. Right here, I can show you.

Q. You show me.

A. 30 pounds of 16 box nails.

Q. Which exhibit?

A. Each and very one. I went through and checked them. In other words—

(Discussion between Counsel)

Q. (By Mr. Sorensen) Which item are you talking about?

A. 16 box nails and—

Shall we use any one of them?

Q. For the record, I draw your attention to Exhibit 5. Do you know of your own knowledge how many 16-penny box nails were in fact required by Exhibits 6 to 11 inclusive?

A. Yes

Q. How many?

A. 70 pounds per house and there is 100 pounds per house on the list.

Q. Have you gone through the contracts and totaled what the contracts called for?

A. Yes

Q. What figure did you come up with as the total for all projects. Exhibits 6 to 11 inclusive?

A. If the 61 houses—

Q. Answer my question.

(Discussion between Counsel)

A. 6100 pounds."

Despite the foregoing direct examination, counsel for appellant objected repeatedly and strenuously to our further interrogating Slavens on cross examination concerning the meaning of the "package" term used in these contracts, (Tr. 393-399). The court's ruling on these objections was sound, both from the point of view that contract terms may be explained without violating the parol evidence rule, and also that the matter opened up on direct examination by appellant, it was proper to permit further exploration of the same subject on cross examination.

Also, we submit that appellant well understood that upon completion of each of the contracts in question, that there were overages from the material lists making up the packages in each contract. Appellant's son testified on cross examination of these overages for which appellant

took credit, (Tr. 93-100). So that the 10% leeway testified to by Slavens produced substantial overages for which plaintiff took credit by deducting this quantity of overage materials from the package lists required for the succeeding contract group. These overages more than covered appellant's claimed extras and indicate that he was more than paid in full for all of the claimed extra materials.

In any event we submit that appellant's Point III is not well taken and Slavens' testimony did not violate the parol evidence rule.

POINT IV

THE BILLINGS, THE PAYMENTS, THE RECEIPTS IN FULL AND LIEN WAIVERS WERE ALL MADE BY THE "PACKAGE" AS REQUIRED BY THE CONTRACTS, AND THERE WAS NO NEED FOR APPELLANT TO EXPLAIN ANY OF THESE DOCUMENTS.

In his Brief, Point IV, appellant seeks to shift the emphasis from the contracts in question to what he called "lien waivers" in order to duck the parol evidence rule. He argues that the contracts in question were all complied with by appellant in the matter of the delivery of materials called for by packages 1 and 2, the billings for materials contained in each package, and the execution and delivery of the so-called "lien waivers", each of which contained the provision "received of Payne & Day, Inc. (dollar amount) in full payment for materials furnished by the undersigned for and in connection with the construction and improvements at (description)". He further argues that the contracts were thus relied upon by appellant for all the units covered by them. Again we call attention to the fact that the claimed extras were claimed to have been furnished in connection

with the construction of each of the homes covered by each of these contracts. Furthermore, it should be remembered that in each of the said contracts, there was the provision requiring a writing from the respondent for all "additions and deletions" of materials to be furnished. Apparently in order to evade the effect of this provision, they argue that the so-called "lien waivers" were explained by the witness, Davis, to be "for the materials listed on the written contracts only". We believe such argument to be specious and not justifiable on facts in this record or under the law applicable thereto.

The documents to which appellant refers, in fact, were primarily receipts signed by appellant for payment in full for all materials furnished, and the "lien waivers" contained therein are an additional evidence of this fact. There is no need for explanation of the documents because there is no ambiguity in the same. It is not this receipt and "lien waiver" which we contend the parol evidence rule applies to. It is rather the contracts (Exhibits 6 through 11) which appellant seeks to vary by parol evidence in violation of that rule. The "lien waivers" are merely an evidence of the performance of the contract in question. Appellant's entire claim is based upon these contracts, even to the reliance on the date of each to establish the time when he allegedly delivered the claimed extras. He acknowledges the contracts and all of their terms and his performance of same, but when it comes to the contractual provision requiring a writing with respect to "additions and deletions", he repudiates the contracts and asks the Court to help him violate same. Thinking to better his position, he shifts away from the contracts in question and rushes to the so-called "lien waivers", claiming that they need explanation, al-

though they are clear and unambiguous, in order to avoid the parol evidence rule which clearly prevents him from varying the terms of the written contracts.

The contracts in question required the delivery of materials called for in package 1 and package 2 for each home unit. The lists for each package on each unit contained a 10% leeway or overage of required material. Appellant delivered these materials called for, made billings for each package on each of the units, received and acknowledged payment in full of each package on each of the units and executed lien waivers covering same. During all of the time that the contracts in question were being performed, appellant was secretly arranging with Slavens, according to his testimony, which was denied by Slavens, building up extras to be asserted against respondent at some future time. Not until several months after all of the contracts had been completely performed and appellant had receipted in full payment for all materials called for by him, appellant asserted the claim against Slavens, and respondent had no knowledge of it until three months after the construction was completed. All through the trial, respondent objected to the only proffered evidence in support of appellant's claim relying upon the provision of the contracts in question which required appellant to procure a writing from respondent covering any extras furnished. The court, in considering the evidence submitted by appellant in support of his claim, was of the opinion that, viewing same in the light most favorable to appellant, it did not establish his claim for extras and granted respondent's motion to dismiss. We believe in so doing the court followed the facts which developed at the trial, and the law as applied to those facts, and committed no error.

CONCLUSION

On this record, viewing the evidence most favorable to appellant, the court did not commit error because: (1) the "additions and deletions" provision was a term of written contracts and appellant's proffered oral evidence violated the parol evidence rule as an attempt to vary same; (2) respondent's construction superintendent had no authority, express or implied, to waive the contractual provision concerning "additions or deletions", nor was there any grounds upon which estoppel could be applied against respondent relying on said provision; (3) explanation of the contract term "package" by respondent's witness was not a violation of the parol evidence rule; and (4) the parties having fully performed the written contracts in question and appellant, having been paid in full for all materials furnished thereunder, cannot thereafter legally base a claim on oral evidence which varies the terms of the written agreements. We respectfully urge that the order granting respondent's motion to dismiss be sustained and affirmed.

Respectfully submitted,

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